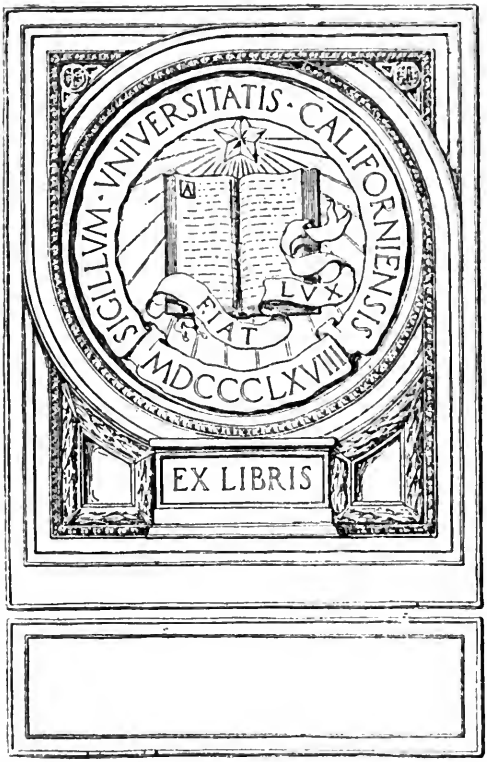

THE

Canadian Constitution

Historically Explained

BY ANNOTATED STATUTES, ORIGINAL DOCUMENTS AND LEADING CASES

By

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PREFACE

This book is a complex of English and Canadian Constitutional History and Law and Legal History, and the making of it is due to an illusion which seems to beset that abstract person, the average student.

There lies beneath his acquired knowledge to the contrary, a sub-conscious conviction that the Canadian Constitution began and ended with the passage of the British North America Act.

As a lecturer, the author found that his efforts to eradicate this illusion were hindered by the absence of any succinct and yet comprehensive outline of the evolution of our entire legislative, executive and judicial systems. Of books on these subjects, there is, of course, an abundance, but the study and co-ordination of their contents is for the honour student; where disinclination does not, the very abundance and bulk of such books will effectually exclude the ordinary student.

The latter cannot, however, grasp the working constitution of to-day without some knowledge of the origin of and changes in the powers of law-making bodies and courts.

The aim of this book is to act as a commonplace book from which a student can extract a modicum of knowledge without the expenditure of undue labour on constitutional and legal history.

An endeavour is made in working out this aim to make the subject "live," by the use of actual statutes, cases, and documents.

The author is bold enough to believe that even the student specializing in Constitutional Law or History may derive some benefit from the book as a "kernel," round which his deeper studies may fashion the fruit of a more detailed and riper knowledge.

It is, however, for "the average student" and "the man in the street," or, perhaps, the very "general practitioner," that the author has written and by them he would be judged.

Some of the books which have been found of use in making the books are Anson's Law and Custom of the Constitution, Pollock and Maitland's History of English Law, Holdsworth's History of English Law, Maitland's Constitutional History of England, Dicey's Law of the Constitution, Freeman's Growth of the English Constitution, Lewis' Government of Dependencies, Keith's Responsible Government in the Dominions, Lefroy's Canada's Federal System, Clement's Canadian Constitution, Bourinot's Constitution of Canada, Taswell-Langmead's English Constitutional History, Hodgins' Provincial Legislation, Dicey's Privy Council, Low's Governance of England, Egerton and Grant's Canadian Constitutional Development, Ilbert's Parliament, Bagehot's English Constitution, Houston's Constitutional Documents, Adams' and Stephens' Constitutional Documents, Redlich's Procedure of the House of Commons, the Law Quarterly Review, Provincial Legislation, Canada Sessional Papers, etc.

His conscious borrowings from these books, the author has taken pains to acknowledge; many of them are now of the very warp of the subject, and any student thereof must needs often unconsciously borrow much.

WALTER S. SCOTT.

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The Canadian Constitution

Historically Explained by Annotated Statutes, Original Documents and Leading Cases

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CHAPTER I.

Guiding Principles of the Study of Constitutional Law.

Material Sources of Canadian Constitutional Law.

The Constitution of Canada is to be found in (1) the great charters of English liberties, *e.g.,* Magna Charta, The Petition of Right, The Bill of Rights and The Act of Settlement; (2) the Conventions of the English Constitution; and (3) The British North America Act.

Difference between English and Canadian Constitutions.

Indeed the only vital differences between the English and the Canadian Constitution of to-day seems to lie in the fact that the English Parliament is a sovereign law-making body, whilst the Canadian Parliaments are non-sovereign, and that the government of England is a unitarian government, and the government of Canada is federal.

Guiding Principles of Study of Constitutional Law.

The guiding principles of the Study of Constitutional Law have been laid down in Professor Dicey's Law of the Constitution, which should be read by every student of the Canadian Constitution. The limits of this book only permit the following resumé of portions of that invaluable work.

Constitutional Law is defined by Dicey at p. 22 as including "all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state." These rules include:

1. *The Law of the Constitution,* constitutional law proper, rules enforced by the Courts, whether written or unwritten.

2. *Conventions of the Constitution*, constitutional morality, *e.g.*, the rule that ministers resign office when they have ceased to command the confidence of the House of Commons.

There are three guiding principles in the study of Constitutional Law, (a) the legislative sovereignty of parliament, (b) the universal rule or supremacy throughout the Constitution of ordinary law, (c) the dependence in the last resort of the conventions upon the law of the Constitution (Dicey, p. 34).

Guiding Principle A—The Legislative Sovereignty of Parliament.

The English parliament has the right to make or unmake any law whatever, and further, no person or body is recognised by the law of England as having the right to override or set aside the legislation of parliament; thus in 1716, parliament, although an Act, The Triennial Act, limiting the duration of parliament to three years, passed the Septennial, permitting a parliamentary life of seven years, not only to future parliaments but also to itself. It can by an Act of Indemnity make legal transactions which were illegal when they took place, and can dissolve a valid or validate an invalid marriage. Never since 1766 has the Crown asserted any right of legislating by proclamation or Order in Council (other than a delegated right), for England, though it can so legislate for conquered or ceded territory prior to the grant to such territory of representative institutions. Other possible competitors with parliament are one House alone, the electors and the Law Courts. The first mentioned has the rights in respect of its own privileges subsequently dealt with, the second has no right other than to elect Members of Parliament, while the third certainly do legislate, but such legislation is always liable to be upset by the Courts (Dicey, p. 38).

Limits of Sovereign Power.

There are, however, certain limits on the right of a sovereign power. The limits are external or internal. The external limit is imposed by the fact that these certain laws which the subject from its nature will infallibly disobey, *e.g.*, if Christianity were abolished by the sovereign, obedience would be refused; the internal limit is imposed by the nature of the sovereign itself, thus no English parliament would wish to tax the Colonies,

Dicey notices that the effect of representative government is to produce a coincidence between these external and internal limits (Dicey, p. 82).

Marks of Parliamentary Sovereignty.

The marks of parliamentary sovereignty are three in number:

1. There is no law which parliament cannot change.
2. There is no distinction between fundamental or constitutional laws and other laws.
3. No judicial or other authority has any right to nullify an Act of Parliament or to treat it as void or unconstitutional.

Canadian Parliaments. How Far Sovereign.

The marks of non-sovereign law-making bodies are the negations of the marks of parliamentary sovereignty. Of the three guiding principles mentioned above, the first is not completely applicable to Canada, inasmuch as Canadian parliaments or assemblies, though they have plenary authority within the areas assigned to them by the British North America Act, yet that area is circumscribed.

Federation, Meaning of.

The Dominion of Canada is a federation, *i.e.*, a union of component states, wherein there is a central legislature which has authority to pass laws directly obligatory upon the people, the component states also having legislative power. In confederations, on the other hand, the central body has relations with the component states only, and not directly with individuals, *e.g.*, Austria-Hungary (see address of J. S. Ewart at the first meeting of the Canadian Bar Association).

Executive Government of Canada.

Though the government of the Dominion of Canada is federal, yet Canadian executive government is modelled on the system of parliamentary cabinet government as it exists in England, and does not in anywise imitate the presidential government of America.

Increase of Power of Cabinet.

"The principal change," says Todd, "effected by the development of the English Constitution since the revolution of

1688 has been the virtual transference of the centre and force of the State from the Crown to the House of Commons." "One might add," says Low, "that the principal change effected since 1832 has been the further tendency to shift this 'centre and force' from Parliament to the Cabinet, and to render the latter amenable to the control of the constituent bodies themselves rather than to that of their elected representatives." In the language of Mr. Bernard Holland, quoted by Low, it does not seem that that day is far off when the House of Commons will become "a mere body for registering the decrees of a secret committee, largely consisting of men in the House of Lords who never come near it."

Characteristics of Presidential Government of America.

In the United States the distinction of powers, theoretical with us, or obsolete, is still alive and operative The Executive is kept apart from the Legislature. The members of the Cabinet do not sit in Congress; they are merely heads of departments, responsible to the President, who is the chief of the administration. Congress occupies itself in making laws and providing for the raising and disbursement of the Federal Revenues. There is no ministry directly responsible to the Legislature, unless it be the chairmen of the various committees of the House of Representatives, whose ministerial functions are in many respects more important than those of the Cabinet officers. These latter are only highly-placed confidential clerks, like our "permanent" under-secretaries, though without the element of permanence. The President is Premier for the purpose of diplomatic negotiations, naval and military administration, and foreign affairs; but for legislative purposes, the Prime Minister, if there be such a functionary, is the Speaker of the House of Representatives, who nominates the committees and takes care that the chairmen are members of the dominant party. The several sections of this ministry of committees act separately, without concurrence or true concert, with very little reference to the executive, and sometimes with scant regard to a common policy. Finance is regulated under a method which has been described as that of spending according to the suggestions of one body and taxing in obedience to the suggestions of another. The Chairman of the House Committee of Ways and Means has sometimes been called the

American Chancellor of the Exchequer. But he is a Chancellor of the Exchequer who has only to look after the raising of revenue. The expenditure is under the control of another finance minister, the Chairman of the Committee of Appropriations; while the Cabinet officer, actually at the head of the Treasury Department, is not responsible for either side of the Budget, and is indeed little more than an expert witness who is allowed to lay his suggestions before the Congress committees for acceptance or rejection. The American system divides responsibility and makes it difficult to place it anywhere. The Congress cannot control a President who has been elected, without reference to its feelings and sympathies, for a fixed term of years; the President has no authority over a Congress which may happen to have a majority drawn from a party opposed to him, since he cannot dissolve from the representatives to the electorate; and the House of Representatives has little power even over its own business, which is really transacted by the heads of the "two-score little legislatures" that owe their being to the Speaker." (Low, 49).

Leading Characteristics of Completely Developed Federalism.

There are three leading characteristics of completely developed federalism, the supremacy of the Constitution, the distribution among bodies with limited and co-ordinate authority of the different powers of government, the authority of the Courts to act as interpreters of the Constitution (Dicey, p. 140).

Guiding Principle B.—The Rule of Law.

The rule of law has three meanings:

1. No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land (Dicey, p. 183).
2. Every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals (Dicey, p. 189).
3. The general principles of the Constitution are the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts;

> whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the Constitution (Dicey, p. 191).

Thus as an exemplification of the third meaning, it should be noticed that our much-vaunted right to personal liberty is nothing but a person's right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification. Upon infringement of the right there arises a right to an action for assault or for false imprisonment or to the issue of a writ of *Habeas corpus*.

So our right to freedom of discussion is but our right to say what we please, provided we do not slander another or utter sedition.

With regard to the right of public meeting: English law does not recognise any special right of public meeting. The right of assembling is nothing more than the result of the view taken by our Courts of individual liberty of person and individual liberty of speech.

A. has a right to walk down a street; B. has the same right, C., D. and all their friends have the right to go there also.

As an example of the second meaning it must be noticed that a soldier, though subject to military law, is also subject to the ordinary law of the land.

So also there is the same law for a state official as for a private individual. There is no *droit administratif*.

Droit Administratif.

Droit administratif is that portion of French law which determines (1) the position and liabilities of all state officials, (2) the civil rights and liabilities of private individuals in their dealings with officials as representatives of the State, and (3) the procedure by which these rights and liabilities are enforced. It depends on the theory that the government and its officials ought (whilst acting officially) to be independent of and to a great extent free from the jurisdiction of the ordinary Courts, and that every servant of the government as a representative of the nation has privileges as against private citizens. The ordinary law Courts have no jurisdiction in

matters concerning the state, such matters are decided by administrative Courts (Dicey, p. 329).

Guiding Principle C—Dependence of Conventions upon Constitution.

Conventions are mostly rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised, *i.e.*, how the prerogative ought to be exercised, or are rules for determining the mode in which the discretionary power of the Houses of Parliament (*i.e.*, privileges) can be exercised.

The breach of the conventions will bring the offenders almost immediately into conflict with the Courts and the law of the land.

CHAPTER II.

Limitations Upon Canadian Legislative Power.

The limitations upon the legislative power of a colony are of four sorts:

1. Those arising from the essential character of a parliament of a dependency as not sovereign in the full sense.
2. The territorial limits of their authority.
3. The rule of non-repugnancy to Imperial law.
4. The limitations as to constitutional change (see Keith, p. 361).

The nature of the legislative powers of the provincial legislatures are laid down clearly in *Hodge* v. *The Queen*, 9 A. C. 117: "They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the Local Legislature is supreme, and has the same authority as the Imperial Parliament or the Parliament of the Dominion would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect."

Extra-Territorial Legislation.

In discussion of the question of how far the Dominion or the provinces can legislate as to acts done outside their respective territories, several important principles have to be kept in mind.

1. The Imperial Parliament can pass any legislation it pleases, and judges of the English Courts or any other

Courts have never to think of whether the legislation is *ultra vires* or not. It cannot be *ultra vires*.

2. There may, however, be a failure in *executive* power to enforce Imperial legislation.

3. Imperial legislation may be disregarded in the Courts of other countries as opposed to the comity of nations, or, in other words, contrary to private international law.

4. *Prima facie* Imperial legislation is only for those who owe obedience to such laws, though under principle 11 it can expressly pass legislation to affect any person in respect of acts done anywhere, though restrained by the facts of principles 2 and 3 from doing so save in matters of grave importance.

1. Dominion and provincial legislatures are legislatures restricted in the area of their powers, but within that area unrestricted, and not acting as agents or delegates of the Imperial legislature.

2. Dominion and provincial judges have the duty of deciding as to whether a statute is *ultra vires* or not, but not as to its policy.

3. Dominion or provincial legislation, though *intra vires*, might, like Imperial legislation, be disregarded in other jurisdictions, as being contrary to the principles of private international law.

Forsyth tells us that the law officers of the Crown advised with respect to British Guiana in February, 1855: 'We conceive that a colonial legislature cannot legally exercise its jurisdiction beyond its territorial limits—three miles from the shore—or at the utmost can only do this over persons domiciled in the colony who may offend against its ordinances, even beyond this limit, but not over other persons."

In *Macleod* v. *Attorney-General of New South Wales*, 60 L. J. P. C. 55, this question was considered. A statute of New South Wales provided that "Whosoever being married marries another person during the life of the former husband or wife—wheresoever such second marriage takes place—shall be liable to penal servitude for seven years."

The Privy Council translated the words "whosoever being married" as meaning "whosoever being married, and who is amenable at the time of the offence committed to the jurisdiction of the colony of New South Wales" and "wheresoever"

as equivalent to "wheresoever in this colony the offence is committed." Their lordships so translated the words because they did not desire "to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and, indeed, inconsistent with the most familiar principles of international law."

"Their lordships think it right to add that they are of opinion that, if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the Bar, it would have been beyond the jurisdiction of the colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted, 'Extra territorium jus dicenti impune non paretur,' would be applicable to such a case. Lord Wensleydale, when Baron Parke, advising the House of Lords in *Jefferys* v. *Boosey*, expresses the same proposition in very terse language. He says (p. 926): 'The legislature has no powers over any persons except its own subjects—that is persons, natural-born subjects, or resident, or whilst they are within the limits of the kingdom. The legislature can impose no duties, except on them, and when legislating for the benefit of persons must, *primâ facie*, be considered to mean the benefit of those who owe obedience to our laws, and whose interest the legislature is under a correlative obligation to protect." All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, her Majesty and the Imperial Legislature have no power whatever. It appears to their lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than her Majesty's subjects; more than any persons who may be within the jurisdiction of the colony by any means whatsoever; and that therefore if that construction were given to the statute, it would follow as a necessary result that the statute was *ultra vires* of the colonial legislature to pass. Their lordships are far from suggesting that the legislature of the colony did mean to give themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used subject to the well known and well considered limitation that they were only legislating for those who were actually within their jurisdiction and within the limits of the colony.

The facts of the case were that Macleod married in New South Wales in 1872, and again in Missouri in 1889, and was convicted for bigamy in New South Wales. The indictment did not show the nationality or domicile or habitual residence of the accused.

Judge Clement, at p. 104 of his Canadian Constitution, says that this decision must be taken as holding that a colonial legislature cannot affix criminal character to acts committed out of the colony by persons other than British subjects; and as a strong expression of opinion *obiter* against the validity of colonial legislation as to the acts abroad of any person. There is no suggestion, he says, of any such thing as colonial citizenship short of national British allegiance.

Mr. Lefroy, at p. 103 of his Federal System, says that it seems beyond question that they (Dominion and Provincial Legislatures) must have the same power to bind their own subjects everywhere, as the Imperial Parliament has to bind British subjects everywhere. The expression 'subject of a colony' has, he says, high judicial authority and may be taken to mean British subjects domiciled in the colony.

This view is suggested as a possibility in the opinion of the law officers, *supra*.

Right of Extra-Territorial Restraint.

Even if there be a territorial limitation upon the legislative powers of the Dominion, Canadian courts, as Judge Clement remarks at p. 104, have treated the Macleod case as binding only to the extent of the actual decision, *i.e.*, as limited to criminal law and to the case of foreigners without the colony, and as leaving open the question as to British subjects whether such by birth or naturalization; yet such limitation must not be insisted in such a manner as to render the grant of legislative power ineffectual, thus power to expel aliens who have entered Canada against the laws of the Dominion, brings with it the power to impose that extra-territorial constraint which is necessary to enable the government to expel those aliens from their borders to the same extent as the Imperial Government could itself have imposed the constraint for a similar purpose (*Attorney-General* v. *Cain* [1906] A. C. 542).

It seems clear also that there must be power to control the army and navy of Canada, when beyond the limits of the Dominion.

Section 275 of the Criminal Code (Bigamy is the act of a person who, being married, goes through a form of marriage with any other person in any part of the world . . . but no person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such a person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage) was held to be *intra vires* of the Dominion Parliament, and would be *intra vires* on the principle of the Macleod case taken in its widest extent, as the offence apparently might be held to be the leaving of Canada, which might well be held to be an act within Canada, but in *R.* v. *Brierly*, 14 O. R. 525, and in *Re Criminal Code Sections Relating to Bigamy*, 27 S. C. R. 461, that is not the ground of the decisions in favour of the validity of the section, while in the latter case the Chief Justice expressly says that the criminal offence is the marriage. "To transpose or invert the plain words of the enactment so as to make the substantive and principal act the leaving the Dominion with the intent, coupled with the condition that such intent shall be subsequently effectuated, is to make that a crime which the legislature has not contemplated."

Gwynne, J., bases his decision on the manifest intention of the framers of the Canadian Constitution to give to the people of Canada a political status infinitely superior to that of a colony—a national existence in fact as an integral portion of the British Empire—having a Constitution similar in principle to that of the United Kingdom and a parliament with sovereign jurisdiction over all matters placed by the Constitution under their control, and therefore over "Commercial Law" and "Marriage and Divorce," whilst Girouard, J., thought that the Dominion Parliament was only subordinate to the Imperial Parliament in so far as it must not contravene the positive prohibition of repugnancy enacted by the Colonial Laws Validity Act, whilst King, J., with whom Sedgewick, J., agreed, thought that the Act being restricted to Canadian residents distinguished the case from the Macleod case.

Australian View of Extra-Territorial Legislation.

In Australia, the principle that the jurisdiction of a Commonwealth Court must be confined within the territorial limits over which the laws of the Commonwealth extend, *i.e.*, within the Commonwealth and the three mile limit, seems to be

accepted (*The Merchant Service Guild of Australasia* v. *Archibald Currie & Company Proprietary, Limited,* 5 C. L. R. 737).

Judge Clement, at p. 114 of his Canadian Constitution, holds that there is no constitutional limitation upon the power of a Canadian legislature to make laws as to the results which are to follow in Canada (on proceedings either civil or criminal in the Canadian courts) from acts done abroad, or as to the effect to be given in Canadian Courts to Canadian legislation in regard to persons and property without the Dominion or province, as the case may be, or to rights of action accrued abroad.

Distinction between Validity of Law in Colony and its Outside Effect.

"The Court carefully distinguished in *Ashbury* v. *Ellis,* 1893, A. C. 339, between the validity of the law in the colony and its effect outside in other Courts, which of course is quite a different thing, and depends on the doctrines of private international law. Thus the cases which treat of the effect in England of judgments obtained in colonial Courts are not directed to the effect of colonial laws outside the territory, but to the principles of law which apply if a Court proceeds with a case in the absence of the defendant, or where the cause of action has nothing to do with the colony. To put an extreme case, if a colony should allow cases to be brought in its Courts against persons in England in respect of causes of action arising in England under English law, the judgments of the Courts would probably be invalid in any other Court of the world by private international law, but they would not be invalid on the more restricted ground that a colony cannot legislate for more than its territorial limits. But if it subjects persons resident in England to actions in its Courts for matters affecting the colony, as, for instance, a contract to be performed therein, it certainly does not exceed the boundaries of its valid jurisdiction, though the amount of consideration to be paid to its judgments will depend on private international law." (Keith, p. 381).

View of J. W. Salmond.

It is suggested that notwithstanding Macleod's case, there is no genuine rule of substantive constitutional law which prevents a colonial legislature from enacting such extra-

territorial prohibitions or authorizations as may be required for the peace, order and good government of the colony, and as are not repugnant to the enactments of the Imperial Parliament. The true restriction is one imposed by rules of interpretation which by reference to the presumed intention of the legislature will, notwithstanding the use of general words capable of extra-territorial application, cut out all such applications except where necessitated by the express words of the legislature or by necessary implication, and which even where extra-territorial application is clearly intended, will restrict that application to its appropriate subject-matter (for example, to British subjects or to British or colonial ships) in such manner as to harmonize colonial legislation with the principles of international law and with the requirements of an orderly division of jurisdiction and authority between the competent self-governing portions of the Empire. There is, it is submitted, nothing in the decision in Macleod's case which precludes the adoption of this principle. That decision may stand upon the reasons given in the earlier part of the judgment—reasons based solely on the considerations of restrictive interpretation; and the latter or supplementary portion of the judgment, so far as it appears to lay down a rule of constitutional limitation, may legitimately be disregarded as unnecessary for the determination of the case, and as being in reality inconsistent with the more liberal principles subsequently adopted by the Privy Council itself in *The Attorney-General for Canada* v. *Cain.* (The Solicitor-General for New Zealand in 33 L. Q. R. at p. 130).

In *Delaney* v. *Great Western Milling Co.*, 22 C. L. R. 150, D., a Victorian resident bought through his N. S. W. agent wheat to be delivered in N. S. W. D. assigned the benefit of the contract to the defendant company, and received in part payment £150. The Wheat Acquisition Act, 1914, of N. S. W., annulled both contracts and made all moneys paid in respect of them repayable. The company sued for the return of the £150. The majority of the High Court held that Macleod's case did not apply, while Griffin, C. J., and Barton, J., held that the statute was *ultra vires* in so far as it affected to compel return of moneys by a non-resident paid under a contract, though apparently it was good in so far as it required its own citizens to perform existing contracts with non-residents.

CHAPTER III.

Limitation Upon Canadian Legislative Power. Repugnancy to Imperial Law.

Colonial Laws Validity Act, 1865. *An Act to Remove Doubts as to the Validity of Colonial Laws.*

29th June, 1865.

Whereas Doubts have been entertained respecting the Validity of divers Laws enacted, or purporting to be enacted by the Legislatures of certain of Her Majesty's Colonies, and respecting the Powers of such Legislatures; and it is expedient that such Doubts should be removed:

Be it hereby enacted by the Queen's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:—

1. The term "Colony" shall in this Act include all of Her Majesty's Possessions abroad, in which there shall exist a Legislature as hereinafter defined, except the Channel Islands, the Isle of Man, and such Territories as may for the time being be vested in Her Majesty, under or by Virtue of any Act of Parliament for the Government of India;

The terms "Legislature" and "Colonial Legislature" shall severally signify the Authority (other than the Imperial Parliament of Her Majesty in Council), competent to make Laws for any Colony;

The term "Representative Legislature" shall signify any Colonial Legislature which shall comprise a legislative body of which One-Half are elected by Inhabitants of the Colony;

The term "Colonial Law" shall include Laws made for any Colony, either by such Legislature as aforesaid or by Her Majesty in Council;

An Act of Parliament, or any Provision thereof, shall, in construing this Act, be said to extend to any Colony when it is made applicable to such Colony by the express Words or necessary Intendment of any Act of Parliament;

The term "Governor" shall mean the Officer lawfully administering the Government of any Colony;

The term "Letters Patent" shall mean letters patent under the great seal of the United Kingdom of *Great Britain and Ireland.*

(An Act applies to a colony, by necessary intendment, if a consideration of the scope and object thereof leads to the conclusion that the legislature intended to affect a colony, and the words used are calculated to have that effect (*Callender* v. *Colonial Secretary Lagos* [1891] A. C. 460).

2. Any Colonial Law, which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which such laws may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force or Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

(There are two senses in which an Act of Parliament might be said to extend to a colony, *e.g.*, it might extend to a colony because it was introduced into colony either specially or as a member of class of legislation, *e.g.*, English legislation before a certain date by the colony; or by virtue of an Imperial Act. It is, of course, only an Act of the second class which cannot be repealed by Dominion or Provincial legislation, as is clear by the definition of the words "extend to any colony" given in Section 1.

Prior to the Act, the doctrine that there could be legislation by a colony, which was repugnant to the general principles of English law, had frequently been advanced. This hazy principle seems to have been laid to rest by the definite words of the Act.

It has been suggested that the Parliament of the Dominion of Canada could repeal *any* Imperial Act, passed before 1867, on the grounds that the word 'exclusive' in Sec. 91 of the B. N. A. Act — "the 'exclusive legislative authority' of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated"; or, at any rate, any Imperial Act on the subjects enumerated in that section.

This doctrine has not been accepted, and it seems that the opinion expressed in *Tai Sing* v. *Maguire*, 1 B. C. R. (Irving) 107, that the word "exclusive" is clearly a word dividing

power between the Dominion and the Provinces, is the correct one. This is borne out by the opinion of the law officers of the Crown in 1871, who said: "It is abundantly clear that the provision in the Act of the Imperial Legislature, 30 Vict. c. 3, by which the Dominion of Canada was constituted, declaring that the exclusive legislative authority of the Dominion Parliament extends (amongst other things) to copyrights, has reference only to the exclusive jurisdiction in Canada of the Dominion Legislature, as distinguished from the Legislatures of the Provinces of which it is composed.

It should be noticed that in 1889 Sir John Thompson drew up a memorandum to the effect that Section 91 of the B. N. A. Act conferred upon the Dominion Parliament the right to legislate as to copyright without regard to any previous legislation whatsoever, whether passed by the Provincial or Imperial Parliaments, subject only to the Imperial right of disallowance, and also to the control by Imperial legislation subsequent to the B. N. A. Act and applicable to Canada. This memorandum was forwarded to the Privy Council, but apparently the argument contained therein has never been answered by the Imperial government.

It is difficult, however, to see how this position and the Colonial Laws Validity Act can stand together.

For the interpretation of the word 'exclusive' as meaning exclusive of Imperial control, see *Regina* v. *Taylor,* 36 U. C. Q. B. 183).

3. No Colonial Law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of *England,* unless the same shall be repugnant to the Provisions of some such Act of Parliament, Order, or Regulation, as aforesaid.

4. No Colonial Law, passed with the Concurrence of or assented to by the Governor of any Colony, or to be hereafter so passed or assented to, shall be, or deemed to have been, void or inoperative by reason only of any Instructions with Reference to such Law, or the Subject thereof, which may have been given to such Governor, by or on behalf of Her Majesty, by an Instrument other than the Letters Patent or Instrument authorizing such Governor to concur in passing or to assent to Laws for the Peace, Order, and good Government of such

Colony, even though such Instructions may be referred to in such Letters Patent, or last-mentioned Instrument.

5. Every Colonial Legislature shall have, and be deemed at all times to have had full Power within its jurisdiction to establish Courts of Judicature and to abolish and reconstitute the same, and to alter the Constitution thereof, and to make provision for the Administration of Justice therein; and every representative Legislature shall, in respect to the Colony under its Jurisdiction, have, and be deemed at all times to have had, full Power to make laws respecting the Constitution, Powers, and Procedure of such Legislature; provided that such laws shall have been passed in such Manner and Form as may from time to time be required, by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the time being in force in the said Colony.

("Though in some cases no form was necessary to be observed in altering the Constitution, it was always necessary that a Colonial Constitution should be altered expressly: it would never have been possible to alter such a Constitution merely by an ordinary Act, which incidentally enacted provisions which were in conflict with the Constitution: the Constitution was and is a formal matter requiring formal change. This was laid down in detail in the case of *Cooper* v. *Commissioners* of *Income Tax for the State of Queensland* (Keith, p. 425 (1907), 4 C. L. R. 1304). It should be noted that this decision applies generally to *all* cases of change of Constitution, and would cover such cases as, *e.g.*, formerly Cape and Natal and now the Canadian Provinces, where there are special conditions laid down regarding constitutional changes. These, it holds, and I think rightly, must still be enacted as such" (K. 426); (see *Re Initiative and Referendum Act,* [1917] 1 W. W. R. 1012).

6. The Certificate of the Clerk or other proper Officer of a Legislative Body in any Colony to the Effect that the Document to which it is attached is a true Copy of any Colonial Law assented to by the Governor of such Colony, or of any Bill reserved for the signification of Her Majesty's Pleasure by the said Governor, shall be *primâ facie* Evidence that the Document so certified is a true copy of such Law or Bill, and as the Case may be, that such Law has been duly and properly passed and assented to, or that such Bill has been duly and properly passed and presented to the Governor; and any Pro-

clamation, purporting to be published by Authority of the Governor, in any Newspaper in the Colony, to which such Law or Bill shall relate, and signifying Her Majesty's Disallowance of Colonial Law, or Her Majesty's assent to any such reserved Bill as aforesaid, shall be *primâ facie* Evidence of such Disallowance or Assent.

* * * * *

7. All Laws or reputed Laws enacted or purporting to have been enacted by the said Legislature, or by Persons or Bodies of Persons for the time being acting as such Legislature, which have received the Assent of Her Majesty in Council, or which have received the Assent of the Governor of the said Colony in the Name and on behalf of Her Majesty, shall be and be deemed to have been valid and effectual from the Date of such Assent for all Purposes whatever; provided that nothing herein contained shall be deemed to give Effect to any Law or reputed Law which has been disallowed by Her Majesty, or has expired, or has been lawfully repealed, or to prevent the lawful Disallowance or Repeal of any law.

CHAPTER IV.

Introduction of English Law Into Canada.

In Nova Scotia, New Brunswick and Prince Edward Island (colonies acquired by settlement) there is no law expressly introducing English laws. In Quebec (a ceded colony), English criminal law was introduced by proclamation after the Treaty of Paris in 1763, while by virtue of the Quebec Act, 1774, the law which governs civil rights in Quebec is in the main the French law as it existed at the time of the cession of Canada. In Ontario it was enacted in 1791 that in all matters of controversy relative to property and civil rights resort should be had to the laws of England as the rule for the decision of the same. It would seem that this includes all English law in force at the passing of this Act which is of general application as distinct from local law, *i.e.,* law confined to some particular locality or local institution in England (see *Keewatin Power Co.* v. *Kenora*, 16 O. L. R. 184). In Alberta and Saskatchewan it is provided that the laws of England relating to civil and criminal matters as the same existed on the 15th day of July, 1870, shall be in force in the Territories, in so far as the same are applicable to the Territories, and in so far as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the Territories or of the Parliament of Canada (The North-West Territories Act, 1886). Up to 1887 the English law in force in the North-West Territories was probably the law of England as existent in 1670, the date of the granting of its charter to the Hudson's Bay Co. The Alberta Act, 1905, which established the Province of Alberta, provides by sec. 16 that all laws and all orders and regulations made thereunder, so far as they are not inconsistent with anything contained in this Act or as to which this Act contains no provision intended as a substitute therefor, and all Courts of civil and criminal jurisdiction, and all commissions, powers, authorities and functions and all officers and functionaries, judicial, administrative and ministerial, existing immediately before the coming into force of this Act, in the territory hereby

established as the Province of Alberta, shall continue in the said province as if this Act and The Saskatchewan Act had not been passed, subject nevertheless except with respect to such as are enacted by or existing under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland, to be repealed, abolished or altered by the Parliament of Canada or by the Legislature of the said province. Saskatchewan has precisely similar provisions. In Manitoba it is provided by an Act of 1888 that 'The laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the 18th July, 1870, were from the said day and are in force in the province of Manitoba, in so far as the same are applicable to the said province, and in so far as the same have not been and are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the said Province, or of the Parliament of Canada. Up to this time the law in force in Manitoba with respect to matters within the sphere of the Dominion Government, but not legislated upon by it, was the law of England as existent in 1670, the date of the granting of its charter to the Hudson's Bay Company. By a Manitoba Act of 1874 it was provided that the Court of Queen's Bench shall decide and determine all matters of controversy relative to property and civil rights according to the laws existing or established and being in England, as such were, existed and stood on the 15th day of July, 1870, so far as the same can be made applicable to matters relating to property and civil rights in this province.

By proclamation 19th November, 1858, Governor Douglas introduced into the mainland of British Columbia the civil and criminal laws of England, as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, and this provision was extended by an Act of British Columbia to the whole colony in 1871. Shortly after the passage of the last mentioned Act British Columbia was admitted into the Dominion.

In Nova Scotia, the exclusion of any of the common law is the exception, but it must be quite clear that an English statute is applicable and necessary before it will be decided that it is in force in the colony (see *Uniacke* v. *Dickson,* James 287). Every year should render the Courts more cautious in the

adoption of laws that have never been previously introduced into the colony, especially where the legislature of the colony has passed statutes on the subject (see *Uniacke* v. *Dickson,* James 287). In Manitoba, Alberta and Saskatchewan the same requirement of necessary applicability as a condition of bringing into force an English statute seems to exist, while in New Brunswick and British Columbia the burden of showing that an English statute, possibly applicable, is not applicable, falls upon the person asserting the inapplicability (see *Watt* v. *Watt,* 13 B. C. 281).

CHAPTER V.

Conflict Between Dominion and Provincial Legislative Powers.

The power given to the Dominion by sec. 91 of the B. N. A. Act is to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada is to extend to all matters coming within the classes of subjects next hereinafter enumerated.

It should first be noticed that the power to make laws for the peace, order and good government of Canada is not in terms an exclusive power; secondly, that the whole section should be read as if it gave authority to legislate on the enumerated subjects and, moreover, upon all matters unquestionably of Canadian interest and importance, even though not amongst the enumerated subjects, but not to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest (see *City of Montreal* v. *Montreal Street Railway* [1912] A. C. at 343).

After the enumeration of subjects under the exclusive legislative authority of the Dominion, there follows a provision that any matter coming within any of the classes of subjects enumerated in the section are not to be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the powers of the Provinces by section 92.

This provision enables the Dominion Parliament to override the provincial assemblies, where, but only where, legislation on what might be called statutory provincial subjects is necessarily incidental to the exercise of the powers conferred upon the Dominion Parliament by the enumerated heads of clause 91 (see *Citizens Insurance Co.* v. *Parsons*, 7 A. C. at 108), but where no Dominion legislation exists upon subjects which might be treated as necessarily incidental to the exercise of Dominion enumerated powers, or are ancillary to a law solely

within the legislative authority of the Dominion. A province can legislate thereon (if within the enumerated powers assigned to them, and, it should be noticed, the power to legislate on matters of a merely local or private nature is an enumerated power of the provinces), until the Dominion does so legislate, whereupon the provincial legislation is over-ridden but not repealed, though the abstinence of the Dominion from legislation on any subject could not transfer the right to legislate on that subject to a province, if not already within its powers. Thus, 'Bankruptcy and Insolvency' is a subject exclusively assigned to the Dominion, "Property and Civil Rights in the Province" is exclusively assigned to the provinces. A general bankruptcy law must necessarily interfere with property and civil rights in the province and the predominance of Dominion legislation would over-ride provincial legislation on the subject. On the other hand it might be necessary for the Dominion, in framing a bankruptcy Act, to deal with the effect of executions in a way not consistent with existent provincial legislation on that subject. In that event, the Dominion legislation on the subject of executions, being incidental to its legislation on bankruptcy, would over-ride provincial legislation, but until such Dominion legislation is passed, the provinces can legislate as to the effect of executions, but could not legislate as to bankruptcy proper, *i.e.*, apparently, as to the rateable distribution of a man's property amongst his creditors, whether he is willing that it shall be so distributed or not (see *Ontario (A. G.)* v. *Canada (A. G.)* [1894] A. C. 19, and the Fisheries Case [1898] A. C. 700). On the other hand, there being no Dominion bankruptcy law, and therefore no legislation incident to such law, room is left in what might be called the "incidental area" for provincial legislation, *e.g.*, legislation as to an assignment for benefit of creditors.

With regard then to legislation directly upon Dominion enumerated subjects, or legislation necessarily incidental thereto, the Dominion may encroach upon the provincial legislative sphere, so far as to enable the former to fully exercise its enumerated powers.

The Dominion has power to legislate upon subjects not specifically enumerated by virtue of its general power for peace, order and good government of Canada, which may be termed the Dominion residuary power. In legislating under its residuary power the Dominion parliament has no authority to

encroach upon any class of subjects which is exclusively assigned to provincial legislatures by section 92 of The B. N. A. Act (see the *Liquor Prohibition Appeal* [1896] A. C. at 359).

It follows therefore that Dominion legislation cannot legislate upon matters of a merely local or private nature in the province, that class of matters being a class enumerated as No. 16 amongst the provincial enumerated powers. There is a considerable difficulty, however, in drawing the line between a matter which is of unquestionable Dominion-wide importance and one of a private or local nature. In deciding this question, it is necessary to get to the pith and substance of the legislation, and to remember that what may be of Dominion-wide importance from one point of view, may be of merely provincial importance from another, and, further, to remember that what may be of provincial importance only to-day, may be of Dominion-wide importance to-morrow.

Thus, there may be legislation on the drink question in a Dominion aspect, or in a provincial. It was held that the Canada Temperance Act of 1878 was within the legislative powers of the Dominion parliament, as being for the promotion of public order and morals, and so within the general authority of parliament to make laws for the order and good government of Canada, and *as having direct relation to criminal law*. There may be provincial legislation for the suppression of the liquor traffic with the object of the abatement of a local evil, when such legislation is guarded so as not to encroach on subjects reserved to the Dominion (see *Manitoba (A.-G.)* v. *Manitoba License Holders' Association* [1902] A. C. 78), though some recent provincial legislation on this subject is of doubtful validity.

"Great caution," says the Privy Council in the Liquor Prohibition appeal, "must be observed in distinguishing between that which is local and provincial and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become a matter of national concern in such sense as to bring it within the jurisdiction of the parliament of Canada. An Act restricting the right to carry weapons of offence, or their sale to young persons, within the province, would be within the authority of the provincial legislature. But traffic in arms or the possession of them under such circumstances as to raise a

suspicion that they were to be used for seditious purposes, or against a foreign state, are matters which their lordships conceive might be competently dealt with by the parliament of the Dominion."

In *Union Colliery Co.* v. *Bryden*, 68 L. J. P. C. 118, it was held that an enactment by the British Columbia legislature that no Chinaman should be employed in mines was beyond its competence, inasmuch as the matter fell within legislation as to "naturalization and aliens," a Dominion enumerated power. Lord Watson, in delivering the judgment of the Privy Council, said the provisions of the Act "may be regarded as merely establishing a regulation applicable to the working of underground coal mines; and if that were an exhaustive description of the substance of the enactments, it would be difficult to dispute that they were within the competency of the provincial legislature, by virtue either of section 92, subsections 10 or 13. . . . "They are also of opinion that the whole pith and substance of the enactments of section 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore trenches upon the exclusive authority of the parliament of Canada.

Though it is true that whenever a matter is within one of enumerated Dominion classes, legislation in relation to it by a provincial legislature is incompetent, yet it does not follow that the legislation of provincial legislatures is not competent merely because it may have relation to one of the enumerated Dominion classes (see The Fisheries Case, 894 A. C. 700). "For example, provisions prescribing the mode in which a private fishery is to be conveyed or otherwise disposed of, and the rights of succession in respect of it, would be properly treated as falling under the heading 'property and civil rights' within section 92, and not as in the class 'fisheries' within the meaning of sec. 91.

It has been laid down *supra,* that Dominion legislation under its residuary power cannot encroach upon provincial legislation upon enumerated subjects, but this must not be taken to mean that Dominion legislation for the peace, order and good government of Canada is incompetent, where such legislation incidentally affects a provincial enumerated subject, without being actual legislation thereon, *e.g.,* the Dominion

might enact a general prohibition law, though such legislation would necessarily affect 'property and civil rights' within the provinces." Few, if any, laws could be made by parliament for the peace, order and good government of Canada, which did not *in some incidental way* affect property and civil rights; and it could not have been intended, when assigning to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the parliament from the exercise of this general power whenever any such incidental interference would result from it." (*Russell* v. *The Queen*, 51 L. J. P. C. 77).

"The scheme of this legislation, as expressed in the first branch of section 91, is to give to the Dominion parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the provincial legislature. If the 91st section had stopped here, and if the classes of subjects enumerated in sec. 92 had been altogether distinct and different from those in sec. 91, no conflict of legislative authority could have arisen. The provincial legislatures would have had exclusive legislative power over the sixteen classes of subjects assigned to them, and the Dominion parliament exclusive power over all other matters relating to the good government of Canada. But it must have been foreseen that this sharp and definite distinction had not been and could not be attained, and that some of the classes of subjects assigned to the provincial legislatures unavoidably ran into, and were embraced by some of the enumerated classes of subjects in section 91; hence an endeavour appears to have been made to provide for cases of apparent conflict; and it would seem that with this object it was declared in the second branch of the 91st section 'for greater certainty, but not so as to restrict the generality of the foregoing terms of this section,' that (notwithstanding anything in the Act) the exclusive legislative authority of the parliament of Canada should extend to all matters coming within the classes of subjects enumerated in that section; with the same object, apparently, the paragraph at the end of section 91 was introduced, though it may be observed that this paragraph applies in its grammatical construction only to No. 16 of section 92" (N.B.—This view was disapproved of and the paragraph in question was not adopted in the later case: *The Local Prohibition Case*, 65 L. J. P. C. 26). "Notwithstanding this endeavour to give pre-eminence

to the Dominion parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the Dominion parliament. Take as one instance, the subject 'marriage and divorce' contained in the enumeration of subjects in section 91; it is evident that solemnization of marriage would come within this general description, yet 'solemnization of marriage in the province' is enumerated among the classes of subjects in sec. 92, and no one can doubt that notwithstanding the general language of sec. 91, that this subject is still within the exclusive authority of the legislatures of the provinces. So 'the raising of money by any mode or system of taxation' is enumerated among the classes of subjects in sec. 91, but though the description is sufficiently large and general to include 'direct taxation within the province in order to the raising of a revenue for provincial purposes' assigned to the provincial legislatures by sec. 92, it obviously could not have been intended that in this instance also the general power should override the particular one. With regard to certain classes of subjects, therefore, generally described in section 91, legislative power may reside as to some matters falling within the general descriptions of these subjects in the legislatures of the provinces. In these cases, it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and in order to prevent such a result, the two sections must be read together, and the language of one interpreted and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for a decision of the particular question in hand.

"The first question to be decided is, whether the Act impeached in the present appeal falls within any of the classes of subjects enumerated in sec. 92, and assigned exclusively to the legislatures of the provinces; for if it does not, it can be of no validity, and as other questions would then arise. It is only when an Act of the provincial legislature *primâ facie* falls within one of these classes of subjects, that the further questions arise, viz., whether notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in sec. 91, and whether the power of the provincial legislature is, or is not, thereby overborne. (*Citizens Insurance Co.* v. *Parsons,* 51 L. J. P. C. 11).

"It has, no doubt, been many times decided by this Board that the two sections 91 and 92 are not mutually exclusive, that their provisions may overlap, and that where the legislation of the Dominion parliament comes into conflict with that of a provincial legislature over a field of jurisdiction common to both, the former must prevail; but, on the other hand, it was laid down in *Att.-Gen. for Ontario* v. *Att.-Gen, for Canada* —first, that the exception contained in sec. 91 near its end, was not meant to derogate from the legislative authority given to provincial legislatures by sec. 92 sub-sec. 16, save to the extent of enabling the parliament of Canada to deal with matters local or private, in those cases where such legislation is necessarily incidental to the exercise of the power conferred upon that parliament under the heads enumerated in sec. 91; secondly, that to those matters which are not specified amongst the enumerated subjects of legislation in sec. 91, the exception at its end has no application, and that in legislating with respect to matters not so enumerated the Dominion parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the provincial legislature by sec. 92; thirdly, that these enactments—sects. 91 and 92—indicate that the exercise of legislative power by the parliament of Canada in regard to all matters not enumerated in sec. 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any class of subject enumerated in sec. 92; fourthly, that to attach any other construction to the general powers which, in supplement of its enumerated powers, are conferred upon the parliament of Canada by sec. 91, would not only be contrary to the intendment

of the Act, but would practically destroy the autonomy of the provinces; and, lastly, that if the parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation. The same considerations appear to their lordships to apply to two of the matters enumerated in sec. 91, namely, the regulation of trade and commerce. Taken in their widest sense, these words would authorize legislation by the parliament of Canada in respect of several of the matters specifically enumerated in sec. 92, and would seriously encroach upon the local autonomy of the province." (*Montreal* v. *Montreal Street Railway,* 81 L. J. P. C. 145).

Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the provinces, so far as a general law relating to these subjects might affect them. (*Cushing* v. *Dupuy,* 5 A. C. 409).

The Federation Act exhausts the whole range of legislative power, and whatever is not thereby given to the provincial legislatures rests with the parliament. (*Bank of Toronto* v. *Lambe,* 12 A. C. 175).

The power to legislate conferred by that clause (91) may be fully exercised, although with the effect of modifying civil rights in the province. (*Tennant* v. *Union Bank* [1894] A. C. 31).

It does not follow that such subjects as might properly be treated as ancillary to a law solely within the legislative competency of parliament are excluded from the legislative authority of the provincial legislature, if no such Dominion law exists. (*Attorney-Gen.* (*Ont.*) v. *Attorney-Gen.* (*Can.*), [1894] A. C. 189).

The abstinence of the Dominion parliament from legislating to the full limits of its powers could not have the effect of transferring to any provincial legislature the legislative power

which had been assigned to the Dominion by sec. 91 of the Act of 1867 (*Union Colliery Co.* v. *Bryden*, [1899] A. C. 580).

There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires,* if the field is clear, and secondly, that if the field is not clear and in such a domain the two legislations meet, then the Dominion legislation must prevail (*Grand Trunk Rwy. Co.* v. *Attorney-Gen. (Can.)*, 1907, A. C. 65).

The form in which provisions in terms overlapping each other have been placed side by side, shews that those who passed the Confederation Act intended to leave the working out and interpretation of these provisions to practice and to judicial decision. (*John Deere Plow Co.* v. *Wharton,* [1915] A. C. 330).

The general power conferred on the Dominion by sec. 91 of the B. N. A. Act to make laws for the peace, order and good government of Canada, extends in terms only to matters not coming within the classes of subjects assigned by the Act exclusively to the legislatures of the provinces by sec. 92. But if the subject-matter falls within any of the heads of sec. 92, it becomes necessary to see whether it also falls within any of the enumerated heads of sec. 91, for if so, by the concluding words of that section it is excluded from the powers conferred by sec. 92 (*John Deere Plow Co. Ltd.* v. *Wharton,* [1915] A. C. 330).

There is only one case, outside the heads enumerated in sec. 91, in which the Dominion parliament can legislate effectively as regards a province, and that is where the subject-matter lies outside all of the subject-matters enumeratively entrusted to the province under sec. 92 (Reference *Re Insurance Companies*).

A provincial legislature can appoint police magistrates and justices of the peace (*R.* v. *Bennett,* 1 O. R. 445), and regulate their districts and jurisdiction (*In re County Courts of British Columbia,* 21 S. C. R. 446), and create and maintain minor courts of justice. *e.g.*, Courts of Commission in New Brunswick, Division Courts in Ontario, Small Debt Courts in Alberta (see *In re Small Debts Recovery Act,* [1917] 3 W. W. R. 698).

It has been held in Manitoba that provincial legislatures have no power to impose indirect taxation under heading 14 of section 92 of the B. N. A. Act. See *Dulmage* v. *Douglas,* 4 Man. L. R. 495, *sed quære.*

CHAPTER VI.

VIEWS OF PRIVY COUNCIL AS TO CANADIAN COMPANY LEGISLATION.—THREE IMPORTANT CASES.

CASE I.

John Deere Plow Co. v. *Wharton and Duck.*

The real question in both cases is one of importance. It concerns the distribution between the Dominion and the provincial legislature of powers as regards incorporated companies.

The appellant is a company incorporated in 1907 by letters patent issued by the Secretary of State of Canada under the Companies Act of the Dominion. The letters patent purported to authorize it to carry on throughout Canada the business of a dealer in agricultural implements. It has been held by the Court below that certain provisions of the British Columbia Companies Act have been validly enacted by the provincial legislature. These provisions prohibit companies which have not been incorporated under the law of the province from taking proceedings in the courts of the province in respect of contracts made within the province in the course of their business unless licensed under the Provincial Companies Act. They also impose penalties on a company and its agents if, not having obtained a license, it or they carry on the company's business in the province. The appellant was refused a license by the registrar. It was said that there was already a company registered in the province under the same name, and sec. 16 of *The Provincial Statute* prohibits the grant of a license in such a case. The question which has to be determined is whether the legislation of the province which imposed these prohibitions was valid under *The British North America Act.*

The Companies Act of the Dominion provides by sec. 5, that the Secretary of State may, by letters patent, grant a charter to any number of persons not less than five, constituting them and others who have become subscribers to a memorandum of agreement a body corporate and politic for any of the purposes or objects to which the legislative authority of the parliament of Canada extends, with certain excep-

tions which do not affect the present case. *The Interpretation Act* of 1906, by sec. 30, provides among other things that words making any association or number of persons a corporation, shall vest in such corporation power to sue and be sued, to contract by their corporate name, and to acquire and hold personal property for the purposes for which the corporation is created, and shall exempt individual members of the corporation from personal liability for its debts, obligations, or acts, if they do not violate the provisions of the Act incorporating them.

Section 10 of *The Companies Act* makes it a condition of the issue of the letters patent that the applicants shall satisfy the Secretary of State that the proposed name of the company is not the name of another known incorporated or unincorporated company or one likely to be confounded with any such name, and sec. 12 gives him large powers of interference as regards the corporate name. Sec. 29 provides that on incorporation the company is to be vested with, among other things, all the powers, privileges, and immunities requisite or incidental to the carrying on of its undertaking, as if it were incorporated by Act of Parliament. Sec. 30 enacts that the company shall have an office in the city or town in which its chief place of business in Canada is situate, which shall be the legal domicile of the company in Canada, and that the company may establish such other offices and agencies elsewhere as it deems expedient. By sec. 32, it is provided that the contract of an agent of the company made within his authority is to be binding on the company, and that no person acting as such agent be thereby subjected to individual liability.

Turning to the relevant provisions of the *British Columbia Companies Act*, these may be summarized as follows: An extra-provincial company means any duly incorporated company other than a company incorporated under the laws of the province or the former colonies of British Columbia and Vancouver Island (sec. 2). Every such extra-provincial company having gain for its object must be licensed or registered under the law of the province, and no agent is to carry on its business until it has been done (sec. 139). Such license or registration enables it to sue and to hold land in the province (sec. 141). An extra-provincial company, if duly incorporated by the laws of, among other authorities, the Dominion, and if duly author-

ized by its charter and regulations to carry out or effect any of the purposes or objects to which the legislative authority of the provincial legislature extends, may obtain from the registrar a license to carry on business within the province on complying with the provisions of the Act and paying the proper fees (sec. 153). If such a company carried on business without a license it is liable to penalties (sec. 167), and the agents who act for it are similarly made liable, and the company cannot sue in the courts of the province in respect of contracts made within the province (sec. 168). The registrar may refuse a license when the name of the company is identical with or resembling that by which a company, society, or firm in existence is carrying on business, or has been incorporated, licensed, or registered, or when the registrar is of opinion that the name is calculated to deceive, or disapproves of it for any other reason (sec. 18).

The charter of the appellant company was granted under the seal of the Secretary of State of the Dominion in 1907. It purported, as already stated, to confer power to carry on throughout the Dominion of Canada and elsewhere, the business of a dealer in agricultural implements and cognate business, and to acquire real and personal property. It is not in dispute that it was an extra-provincial company having gain for its object. The chief place of business was to be Winnipeg. The registrar refused, as has been mentioned, to grant a license under the Provincial Act to the appellant company. The power of the registrar is not challenged, if the sections of the provincial statute under which he proceeded were validly enacted.

What their lordships have to decide is whether it was competent to the province to legislate so as to interfere with the carrying on of the business in the province of a Dominion company under the circumstances stated.

The distribution of powers under the *British North America Act,* the interpretation of which is raised by this appeal, has often been discussed before the Judicial Committee and the tribunals of Canada, and certain principles are now well settled. The general power on the Dominion by sec. 91 to make laws for the peace, order and good government of Canada extends in terms only to matters not coming within the classes of subjects assigned by the Act exclusively to the legislatures of the provinces. But if the subject matter falls within any of the heads of sec. 92, it becomes necessary to see whether it also falls within any of the enumerated heads of sec. 91, for

if so, by the concluding words of that section it is excluded from the powers conferred by sec. 92.

Before proceeding to consider the question whether the provisions already referred to of the *British Columbia Companies Act,* imposing restrictions on the operations of a Dominion company which has failed to obtain a provincial license, are valid, it is necessary to realize the relation to each other of secs. 91 and 92, and the character of the expressions used in them. The language of these sections and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfectly logical scheme. The draftsman had to work on the terms of a political agreement, terms which were mainly to be sought for in the resolutions passed at Quebec in October, 1864. To these resolutions and the sections founded on them, the remark applies which was made by this board about the Australian Commonwealth Act in a recent case (*Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Company*, 1914, A. C. 237, at p. 254), that if there is at points obscurity in language, that may be taken to be due, not to uncertainty about general principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages. It may be added that the form in which provisions in terms overlapping each other have been placed side by side, shows that those who passed the *Confederation Act* intended to leave the working out and interpretation of these provisions to practice and to judicial decision.

The structure of secs. 91 and 92, and the degree to which the connotation of the expressions used overlap render it, in their lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry. It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided. Their lordships adhere to what was said by Sir Montague Smith in delivering the judgment of the Judicial Committee in *Citizens Insurance Company* v. *Parsons,* 7 App. Cas. 96 at p. 109, 51 L. J. P. C. 11, to the effect that in discharging the difficult duty of arriving at a reasonable

and practicable construction of the language of the sections, so as to reconcile the respective powers they contain and give effect to them all, it is the wise course to decide each case which arises without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand. The wisdom of adhering to this rule appears to their lordships to be of especial importance when putting a construction on the scope of the words "civil rights" in particular cases. An abstract logical definition of their scope is not only, having regard to the context of the 91st and 92nd sections of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases. It must be borne in mind in construing the two sections, that matters which in a special aspect and for a particular purpose may fall within one of them, may in a different aspect and for a different purpose fall within the other. In such cases, the nature and scope of the legislative attempt of the Dominion or the province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and in reality. This may not be difficult to determine in actual and concrete cases. But it may well be impossible to give abstract answers to general questions as to the meaning of the words, or to lay down any interpretation based on their literal scope apart from their context.

Turning to the appeal before them, the first observation which their lordships desire to make is, that the power of the provincial legislature to make laws in relation to matters coming within the class of subjects forming No. 11 of sec. 92, the incorporation of companies with provincial objects, cannot extend to a company such as the appellant company, the objects of which are not provincial. Nor is this defect of power aided by the power given by No. 15, Property and Civil Rights. Unless these two heads are read disjunctively, the limitation in No. 11 would be nugatory. The expression "civil rights in the province" is a very wide one, extending if interpreted literally, to much of the field of the other heads of sec. 92, and also to much of the field of sec. 91. But the expression cannot be so interpreted, and it must be regarded as excluding cases expressly dealt with elsewhere in the two sections, notwithstanding the generality of the words. If this be so, then the power of legislating with reference to the incorporation of

companies with other than provincial objects must belong exclusively to the Dominion parliament, for the matter is one "not coming" within the classes of subjects "assigned exclusively to the legislatures of the provinces" within the meaning of the initial words of sec. 91, and may be properly regarded as a matter affecting the Dominion generally and covered by the expression "the peace, order, and good government of Canada."

Their lordships find themselves in agreement with the interpretation put by the Judicial Committee in *Citizens Insurance Company* v. *Parsons,* 7 App. Cas. at pp. 112, 113, on head 2 of sec. 91, which confers exclusive power on the Dominion parliament to make laws regulating trade. This head must, like the expression "Property and Civil Rights in the Province," in sec. 92, receive a limited interpretation. But they think that the power to regulate trade and commerce at all events enables the parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed on such powers. For if it be established that the Dominion parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade. Their lordships are therefore of opinion that the parliament of Canada had power to enact the section relied on in this case in the *Dominion Companies Act* and the *Interpretation Act.* They do not desire to be understood as suggesting that because the status of a Dominion company enables it to trade in a province and thereby confers on it civil rights to some extent, the power to regulate trade and commerce can be exercised in such a way as to trench, in the case of such companies, on the exclusive jurisdiction of the provincial legislatures over civil rights in general. No doubt this jurisdiction would conflict with that of the province if civil rights were to be read as an expression of unlimited scope. But, as has already been pointed out, the expression must be construed consistently with various powers conferred by secs. 91 and 92, which restrict its literal scope. It is enough for present purposes to say that the province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and powers of a Dominion company as such cannot

be destroyed by provincial legislation. This conclusion appears to their lordships to be in full harmony with what was laid down by the Board in *Citizens Insurance Company* v. *Parsons,* 7 App. Cas. 96; *Colonial Building Association* v. *The Attorney-General for Quebec,* 9 App. Cas. 157, 53 L. J. P. C. 27, and *Bank of Toronto* v. *Lambe,* 12 App. Cas. 575, 56 L. J. P. C. 87.

It follows from these premises that these provisions of the *Companies Act* of British Columbia, which are relied on in the present case as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the province as a condition of exercising its powers or of suing in the courts, are inoperative for these purposes. The question is not one of enactment of laws affecting the general public in the province and relating to civil rights, or taxation, or the administration of justice. It is in reality whether the province can interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carries with it powers conferred by the parliament of Canada to carry on business in every part of the Dominion. Their lordships are of opinion that this question must be answered in the negative.

In the course of the argument their lordships gave consideration to the opinions delivered in 1913 by the Judges of the Supreme Court of Canada in response to certain abstract questions on the extent of the powers which exist under the Confederation Act for the incorporation of companies in Canada. Two of these questions bear directly on the topics now under discussion. The sixth question was whether the legislature of a province has power to prohibit companies incorporated by the parliament of Canada from carrying on business within the province in the absence of a license from its government, if fees are required to be paid upon the issue of such a license. The seventh question was whether the provincial legislature could restrict a company so incorporated for the purpose of trading throughout the whole Dominion in the exercise of the special trading powers so conferred, or could limit such exercise within the province. This question further raised the point whether a Dominion trading company was subject to provincial legislation limiting the business which corporations not incorporated under the legislation of the province could carry on, in their powers, or imposing conditions on the engaging in business by such corporations, or restricting a Dominion com-

pany otherwise in the exercise of its corporate powers or capacity. Their lordships have read with care the opinions delivered by the members of the Supreme Court, and are impressed by the attention and research which the learned judges brought to bear, in the elaborate judgments given, on the difficult task imposed on them. But the task imposed was, in their lordships' opinion, an impossible one, owing to the abstract character of the question put. For the reasons already indicated, it is impracticable to attempt with safety definitions marking out logical disjunctions between the various powers conferred by the 91st and 92nd sections and between their various sub-heads *inter se*. Lines of demarcation have to be drawn in construing the application of the sections to actual concrete cases, as to each of which individually the Courts have to determine on which side of a particular line the facts place them. But while in some cases it has proved, and may hereafter prove, possible to go further and to lay down a principle of general application, it results from what has been said about the language of the Confederation Act that this cannot be satisfactorily accomplished in the case of general questions such as these referred to. It is true that even when a company has been incorporated by the Dominion Government with powers to trade, it is not the less subject to provincial laws of general application enacted under the powers conferred by sec. 92. Thus, notwithstanding that a Dominion company has capacity to hold land, it cannot refuse to obey the Statutes of the Province as to Mortmain (*Colonial Building Association* v. *Attorney-General of Quebec*, 9 App. Cas. 157, at p. 164); or escape the payment of taxes, even though these may assume the forms of requiring, as the method of raising a revenue, a license to trade which affects a Dominion company in common with other companies (*Bank of Toronto* v. *Lambe*, 12 App. Cas. 575). Again, such a company is subject to the powers of the province relating to property and civil rights under sec. 92 for the regulation of contracts generally (*Citizens Insurance Company* v. *Parsons*, 7 App. Cas. 96).

To attempt to define *a priori* the full extent to which the Dominion companies may be restrained in the exercise of their powers by the operation of this principle is a task which their lordships do not attempt. The duty which they have to discharge is to determine whether the provisions of the *Provincial Companies Act* already referred to, can be relied on as justify-

ing the judgments in the Court below. In the opinion of their lordships, it was not within the power of the provincial legislature to enact these provisions in their present form. It might have been competent to that legislature to pass laws applying to companies without distinction, and requiring those that were not incorporated within the province to register for certain limited purposes, such as the furnishing of information. It might also have been competent to enact that any company which had not an office and assets within the province should, under a statute of general application regulating procedure, give security for costs. But their lordships think that the provisions in question must be taken to be of quite a different character, and to have been directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers conferred on them by the parliament of Canada, dealing with a matter which was not entrusted under sec. 92 to the provincial legislature. The analogy of the decision of this board in *Union Colliery Company* v. *Bryden* (1899) A. C. 580, 68 L. J. P. C. 118, therefore applies. They are unable to place the limited construction upon the word "incorporation" occurring in that section which was contended for by the respondents and by the learned counsel who argued the case for the province. They think that the legislation in question really strikes at capacities which are the natural and logical consequences of the incorporation by the Dominion Government of companies with other than provincial objects.

They will, therefore, humbly advise His Majesty that these appeals should be allowed, and that judgment should be entered for the appellant company in the action of *Wharton* v. *The John Deere Plow Company,* with costs. The action by the company against the respondent Duck must, unless the parties come to an agreement, be remitted to the Court below to be disposed of in accordance with the result of this appeal. As to the interveners, the Attorney-General of the Dominion and the Attorney-General of the province, there will be no order as regards costs. The respondents, Wharton and Duck, must pay the costs of the appellant company of this appeal, excepting so far as these have been increased by the intervention.

Case II.

The Bonanza Creek Gold Mining Company, Ltd. v. *The King.*

The appellants were incorporated in Ontario by letters patent, dated December 23, 1904, and issued under the authority of the *Ontario Companies Act* and by virtue of any other authority or power then existing, in the name of the Sovereign and under the Great Seal of the province, by its Lieutenant-Governor. The letters patent recite that this Act authorizes the Lieutenant-Governor-in-Council by letters patent under the Great Seal to create and constitute bodies corporate and politic for any of the purposes or objects to which the legislative authority of the province extends. They go on to incorporate the company to carry on the businesses of mining and exploration in all their branches, and to acquire real and personal property, including mining claims, with incidental powers. There are no words which limit the area of operation or prohibit the company from carrying out its objects beyond the provincial boundaries.

In the years 1899 and 1900 the Crown, through the Minister of the Interior of the Dominion, had granted to predecessors in title of the appellants leases of certain tracts of land, in what is now the Yukon district, for the purposes of hydraulic mining. Two of these leases contained exclusions of so much of the tracts as had been taken up and entered for placer mining claims. In the year 1900 the Crown entered into agreements with these predecessors in title to the effect that, if any of the placer mining claims within the tracts should be forfeited or surrendered, the Crown would include them in the tracts by supplementary leases. The original leases having subsequently been assigned to the appellants, and certain of the placer mining claims having reverted, the Crown purported in 1907 to demise to the appellants these claims, and to agree to demise to them such other of the claims as might thereafter revert, for the same terms of years as those for which the original leases were granted.

In 1906 the Minister of the Interior of the Dominion had purported to issue to the appellants a free miners' certificate. This certificate was issued in conformity with certain regulations under an Order in Council made under the provisions of

The Dominion Lands Act, which gives the right to a free miner's certificate to persons of over 18 and to joint-stock companies, the latter being defined to include any company incorporated "for mining purposes under a Canadian charter or licensed by the Government of Canada."

When the Yukon district was, by the Statute passed by the Dominion Parliament in 1899, made a separate territory, power to make ordinances was conferred on the Commissioner of the territory. Under this power *The Foreign Companies Ordinance* was passed, under which any company, incorporated otherwise than by or under the authority of an ordinance of the territory or an Act of the Parliament of Canada, was required to obtain a license under the ordinance to carry on its business in the Yukon territory. Such a license when issued was made sufficient evidence in the courts of the territory of the due licensing of the company. In September, 1905, the appellants obtained such a license.

In 1908 the appellants presented a petition of right in the Exchequer Court of Canada, alleging that, in breach of the agreement entered into by the Crown, placer mining claims which had reverted to the Crown and should have been leased to the appellants had been wrongfully withheld from the appellants, and that by reason of this and of other breaches of the agreement the appellants had suffered heavy damage, for which they as suppliants prayed compensation. The respondent delivered an answer to the petition of right, the first two paragraphs of such answer being as follows:

"1. The respondent denies that the suppliant has now or ever has had the power, either under letters patent, license, free miner's certificate, or otherwise, to carry on the business of mining in the district of the Yukon or to acquire any mines, mining claims, or mining locations therein, or any estate or interest by way of lease or otherwise in any such mines, mining claims or locations.

"2. Should a free miner's certificate have been issued to the suppliant, the respondent claims that the same is and always has been invalid and of no force or effect, that there was no power to issue a free miner's certificate to the suppliant, a company incorporated under provincial letters patent, and that there was no power vested in the suppliant to accept such a certificate."

Cassels, J., the Judge of the Exchequer Court, ordered the questions of law raised by these paragraphs of the answer to be disposed of, and pending this stayed all other proceedings. He subsequently heard arguments upon the questions thus raised. As the result he decided (6 W. W. R. 1056) that he ought to follow what he conceived to be the opinions given by the majority of the judges of the Supreme Court of Canada in a general reference, which are now before this Board for consideration in the appeal which was argued immediately after the present one. He thought that the majority in the Supreme Court had decided that a provincial company was confined in the exercise of its functions to the province where it was incorporated. He therefore dismissed the petition of right, but without costs, on the ground taken in the first of the above-quoted paragraphs of the answer. On the narrower ground taken in the second paragraph he did not enter.

There was an appeal to the Supreme Court, and the learned judges were divided in their views. The Chief Justice, Davies, J., and Duff, J., were of opinion that it was *ultra vires* of the appellants to exercise powers or to acquire rights outside the boundaries of the province of Ontario. Idington, J., and Anglin, J., were of a different opinion. They held that while a provincial company could exercise its powers as of right only within the province where it was incorporated, it was elsewhere in Canada like a foreign company, and had capacity to accept rights and powers conferred on it by comity by another government.

The majority in the Supreme Court were therefore adverse to the appellants on the first question raised, that as to general capacity. On the question raised by the second paragraph of the answer, Duff, J., expressed an opinion in favor of the appellants. On the question, which was one of construction and arose only if he was wrong in his answer to the wider question, he thought that the condition of acquiring, under the Dominion Regulations approved by the Order in Council already referred to, the right to a mining location to be worked by a hydraulic process, was the obtaining a free miner's certificate under the Dominion Regulations governing placer mining. Under these regulations a joint-stock company might receive such a certificate, if it came within the definition of being incorporated for mining purposes under a Canadian Charter, or licensed by the Government of Canada."

Differing from the Chief Justice, who had been adverse to the appellants on this point also, Duff, J., was of opinion that the expression "Canadian Charter," meant, not a charter granted under Dominion authority, but one emanating from any lawful authority in Canada. Otherwise, as he pointed out, a company incorporated by Yukon authority, or by the Council of the North-West Territories before Yukon became a separate territory, would be excluded, along with companies incorporated by the province before Confederation.

Their lordships have come to the same conclusion on this point as Duff, J. They think that the appellants, if they possessed legal capacity to receive such a Dominion certificate, had it validly bestowed on them, and that, if so, they subsequently obtained a good title to the mining locations, and also to the Yukon license to carry on business which was granted to them. This subordinate question ought therefore to be answered in favour of the appellants.

Their lordships accordingly turn to the larger question raised by the first of the two paragraphs, a question which is of far-reaching importance. It is whether a company incorporated by provincial letters patent, issued in conformity with legislation under sec. 92 of *The British North America Act,* can have capacity to acquire and exercise powers and rights outside the territorial boundaries of the province. In the absence of such capacity the certificates, licenses, and leases already referred to were wholly inoperative, for if the company had no legal existence or capacity for purposes outside the boundaries of the province conferred on it by the Government of Ontario, by whose grant exclusively it came into being, it is not apparent how any other Government could bestow on it rights and powers which enlarged that existence and capacity. The answer to this question must depend on the construction to be placed on sec. 92 of *The British North America Act* and on *The Ontario Companies Act.*

Section 92 confers exclusive power upon the provincial legislature to make laws in relation to the incorporation of companies with provincial objects. The interpretation of this provision which has been adopted by the majority of the judges in the Supreme Court is that the introduction of the words "with provincial objects" imposes a territorial limit on legislation conferring the power of incorporation so completely that by or under provincial legislation no company can be incorporated

with an existence in law that extends beyond the boundaries of the province. Neither directly by the language of a special Act, nor indirectly by bestowal through executive power, do they think that capacity can be given to operate outside the province, or to accept from an outside authority the power of so operating. For the company, it is said, is a pure creature of statute, existing only for objects prescribed by the legislature within the area of its authority, and is therefore restricted, so far as legal capacity is concerned, on the principle laid down in *Ashbury Carriage Company* v. *Riche,* L. R. 7 H. L. 653, 44 L. J. Ex. 185.

Their lordships, however, take the view that this principle amounts to no more than that the words employed to which a corporation owes its legal existence must have their natural meaning, whatever that may be. The words of the *British Companies Act* were construed as importing that a company incorporated by the statutory memorandum of association which the Act prescribes could have no legal existence beyond such as was required for the particular objects of incorporation to which that memorandum limited it. A similar rule has been laid down as regards companies created by special Act. The doctrine means simply that it is wrong, in answering the question what powers the corporation possesses when incorporated exclusively by statute, to start by assuming that the legislature meant to create a company with a capacity resembling that of a natural person, such as a corporation created by charter would have at common law, and then ask whether there are words in the statute which take away the incidents of such a corporation. This was held by the House of Lords to be the error into which Blackburn, J., and the judges who agreed with him had fallen when they decided in *Riche* v. *Ashbury Carriage Company,* L. R. 9 Ex. 224 at p. 230, in the Court below, that the analogy of the status and powers of a corporation created by charter, as expounded in the *Sutton's Hospital Case,* 10 Coke, 1, should in the first instance be looked to. For to look to that analogy is to assume that the legislature has had a common law corporation in view, whereas the wording may not warrant the inference that it has done more than concern itself with its own creature. Such a creature, where its entire existence is derived from the statute, will have the incidents which the common law would attach if, but only if, the statute has by its language gone on to attach them. In the absence

of such language they are excluded, and, if the corporation attempts to act as though they were not, it is doing what is *ultra vires* and so prohibited as lying outside its existence in contemplation of law. The question is simply one of interpretation of the words used. For the statute may be so framed that executive power to incorporate by charter, independently of the statute itself, which some authority, such as a Lieutenant-Governor possessed before it came into operation, has been left intact. Or the statute may be in such a form that a new power to incorporate by charter has been created, directed to be exercised with a view to the attainment of, for example, merely territorial objects, but not directed in terms which confine the legal personality which the charter creates to existence for the purpose of these objects and within territorial limits. The language may be such as to show an intention to confer on the corporation the general capacity which the common law ordinarily attaches to corporations created by charter. In such a case a construction like that adopted by Blackburn, J., will be the true one.

Applying the principle so understood to the interpretation of sec. 92 and of the *Ontario Companies Act* passed by virtue of it, the conclusion which results is different from that reached by the Court below. For the words of sec. 92 are, in their lordships' opinion, wide enough to enable the legislature of the province to keep the power alive, if there existed in the executive at the time of confederation a power to incorporate companies with provincial objects, but with an ambit of vitality wider than that of the geographical limits of the province. Such provincial objects would be of course the only objects in respect of which the province could confer actual rights. Rights outside the province would have to be derived from authorities outside the province. It is therefore important to ascertain what were the powers in this regard of a Lieutenant-Governor before *The British North America Act* passed, and in the second place what the *Ontario Companies Act* has really done.

The Act which was passed by the Imperial Parliament in 1840, in consequence of the Report on the State of Affairs in Canada made by Lord Durham, united the provinces of Upper and Lower Canada under a Governor-General, who had power to appoint deputies to whom he could delegate his authority. This Act established a single legislature for the new United

Province of Canada, and shortly after it had passed responsible government was there set up. In 1867 *The British North America Act* modified the constitution so established. This Act contained a preamble stating that the provinces of Canada, Nova Scotia, and New Brunswick, had expressed their desire to be federally united into one dominion under the Crown, with a constitution similar in principle to that of the United Kingdom. In the case of the *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Company Limited* [1914] A. C. 247, 83 L. J. P. C. 154, this Board had occasion to comment on the contrast between the principles which underlie the distribution of powers in the constitutions of Canada and Australia respectively. They drew attention to the fact that the expression "federal" in the preamble of *The British North America Act* had been used in a somewhat loose fashion, and that the principle actually adopted was not that of federation in the strict sense, but one under which the constitutions of the provinces had been surrendered to the Imperial Parliament for the purpose of being fashioned. The result had been to establish wholly new dominion and provincial Governments with defined powers and duties, both derived from the statute which was their legal source, the residual powers and duties being taken away from the old provinces and given to the Dominion. It is to be observed that *The British North America Act* has made a distribution between the Dominion and the provinces which extends not only to legislative but to executive authority. The Executive Government and authority over Canada are primarily vested in the Sovereign. But the statute proceeds to enact, by sec. 12, that all powers, authorities, and functions, which by any Imperial statute or by any statute of the provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of these provinces shall "as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, "be vested in and exercisable by the Governor-General. Section 65, on the other hand, provides that all such powers, authorities and functions shall "as far as the same are capable of being exercised after the Union in relation to the government of Ontario and Quebec respectively, be vested in and exercisable by the Lieutenant-Governor of Ontario and Quebec respectively."

By sec. 64, the constitution of the executive authority in Nova Scotia and New Brunswick was to continue as it existed at the Union until altered under the authority of the Act.

The effect of these sections of *The British North America Act* is that, subject to certain express provisions in that Act and to the supreme authority of the Sovereign, who delegates to the Governor-General and through his instrumentality to the Lieutenant-Governors the exercise of the prerogative on terms defined in their Commissions, the distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers. In relation, for example, to the incorporation of companies in Ontario with provincial objects the powers of incorporation which the Governor-General or Lieutenant-Governor possessed before the Union must be taken to have passed to the Lieutenant-Governor of Ontario so far as concerns companies with this class of objects. Under both sec. 12 and sec. 65, the continuance of the powers thus delegated is made by implication to depend on the appropriate legislature not interfering.

There can be no doubt that prior to 1867 the Governor-General was for many purposes entrusted with the exercise of the prerogative power of the Sovereign to incorporate companies throughout Canada, and such prerogative power to that extent became after Confederation, and so far as provincial objects required its exercise, vested in the Lieutenant-Governors, to whom provincial Great Seals were assigned as evidence of their authority. Whatever obscurity may at one time have prevailed as to the position of a Lieutenant-Governor appointed on behalf of the Crown by the Governor-General has been dispelled by the decision of this Board in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* [1892] A. C. 437, 61 L. J. P. C. 75. It was there laid down that "the act of the Governor-General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of her Majesty for all purposes of provincial Government, as the Governor-General himself is for all purposes of Dominion Government."

The form of the commission by which the Governor-General appoints a Lieutenant-Governor to be Lieutenant-Governor of Ontario bears this out. For it runs in the name of the Sovereign, and is: "to do and execute all things that shall belong to

your said command and the trust we have reposed in you, according to the several provisions and directions granted or appointed you by virtue of the Act of the United Kingdom of Great Britain and Ireland passed in the thirtieth year of the reign of Her late Majesty Queen Victoria, called and known as *The British North America Act,* 1867, and of all other statutes in that behalf and of this our present Commission, according to such instructions as are herewith given to you or which may from time to time be given to you in respect of the said province of Ontario under the sign manual of our Governor-General of our said Dominion of Canada, or by order of our Privy Council of Canada, and according to such laws as are or shall be in force in the said province of Ontario."

Their lordships have now to consider the question whether legislation before or after Confederation has been of such a character that any power of incorporation by charter from the Crown which formerly existed has been abrogated or interfered with to such an extent that companies so created no longer possess that capacity which the charter would otherwise have attached to them.

Prior to Confederation, the granting of letters patent under the Great Seal of the province of Canada for the incorporation of companies for manufacturing, mining, and certain other purposes was sanctioned and regulated by the Canadian Statute of 1864. This statute authorized the Governor-in-Council to grant a charter of incorporation to persons who should petition for incorporation for the purposes of the enumerated kinds of business. Applicants for such a charter were to give notice in the "Canada Gazette" of, among other things, the object or purpose for which incorporation was sought. By sec. 4 every company so incorporated under that Great Seal for any of the purposes mentioned in this Act was to be a body corporate capable of exercising all the functions of an incorporated company as if incorporated by a special Act of Parliament. Their lordships construe this provision as an enabling one, and not as intended to restrict the existence of the company to what can be found in the words of the Act as distinguished from the letters patent granted in accordance with its provisions. It appears to them that the doctrine of *Ashbury Carriage Company* v. *Riche, supra,* does not apply, where, as here, the company purports to derive its existence from

the act of the Sovereign and not merely from the words of the regulating statute. No doubt the grant of a charter could not have been validly made in contravention of the provisions of the Act. But, if validly granted, it appears to their lordships that the charter conferred on the company a status resembling that of a corporation at common law, subject to the restrictions which are imposed on its proceedings. There is nothing in the language used which, for instance, would preclude such a company from having an office or branch in England or elsewhere outside Canada.

The Dominion Companies Act (ch. 79 of the Revised Statutes of 1906) is, so far as Part I. is concerned, framed on the same principle, although the machinery set up is somewhat different. Part II. stands on another footing. This part deals only with companies directly incorporated by special Act of the Parliament of Canada, and to these it is obvious that other considerations may apply. But the companies to which Part I. applies are, like those under the old statute, to be incorporated by letters patent, the only material difference being that the Act enables these to be granted by the Secretary of State under his own seal of office. When granted, by sec. 5 they constitute the shareholders a body corporate and politic for any of the purposes or objects, with certain exceptions, to which the legislative authority of the Parliament of Canada extends. The Sovereign, through the medium of the Governor-General, in this way delegates the power of incorporation, subject to restrictions, on its exercise, to the Secretary of State, and it is by the exercise of the executive power of the Sovereign that the company is brought into existence.

The Ontario Companies Act, which governs the present case, is ch. 191 of the Revised Statutes of the province, 1897. The principle is similar, save that the letters patent are to be granted directly by the Lieutenant-Governor of the province under the Great Seal of Ontario. Excepting in this respect, the provisions of sec. 9, which corresponds to sec. 5 of the Dominion Act, are substantially the same as those of the latter section, so that, subject to the express restrictions in the statute, it is by the grant under the Great Seal and not by the words of the statute, which merely restrict the cases in which such a grant can be made, that the vitality of the corporation is to be measured. It will be observed that sec. 107 enables an extra provincial company desiring to carry on business within the

province of Ontario to do so if authorized by license from the Lieutenant-Governor, a provision which bears out the view indicated.

It is obviously beyond the powers of the Ontario legislature to repeal the provisions of the Act of 1864, excepting in so far as *The British North America Act* has enabled it to do this in matters relating to the province. If the legislature of Ontario has not interfered the general character of an Ontario company constituted by grant remains similar to that of a Canadian company before Confederation.

The whole matter may be put thus: The limitations of the legislative powers of a province expressed in sec. 92, and in particular the limitation of the power of legislation to such as relates to the incorporation of companies with provincial objects, confine the character of the actual powers and rights which the provincial Government can bestow, either by legislation or through the executive, to powers and rights exercisable within the province. But actual powers and rights are one thing and capacity to accept extra provincial powers and rights is quite another. In the case of a company created by charter the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an act not beyond its capacity, and is therefore not *ultra vires,* although such a violation may well give ground for proceedings by way of *scire facias* for the forfeiture of the charter. In the case of a company the legal existence of which is wholly derived from the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of *ultra vires* applies. Where, under legislation resembling that of the *British Companies Act* by a province of Canada in the exercise of powers which sec. 92 confers, a provincial company has been incorporated by means of a memorandum of association analogous to that prescribed by *The British Companies Act,* the principle laid down by the House of Lords in *Ashbury Carriage Company* v. *Riche,* of course, applies. The capacity of such a company may be limited to capacity within the province, either because the memorandum of association has not allowed the company to exist for the purpose of carrying on any business outside the

provincial boundaries, or because the statute under which incorporation took place did not authorize, and therefore exclude, incorporation for such a purpose. Assuming, however, that provincial legislation has purported to authorize a memorandum of association permitting operations outside the province if power for the purpose is obtained *ab extra,* and that such a memorandum has been registered, the only question is whether the legislation was competent to the province under sec. 92. If the words of this section are to receive the interpretation placed on them by the majority in the Supreme Court the question will be answered in the negative. But their lordships are of opinion that this interpretation was too narrow. The words "legislation in relation to the incorporation of companies with provincial objects" do not preclude the province from keeping alive the power of the executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the province from legislating so as to create, by or by virtue of statute, a corporation with this general capacity. What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act according with the distribution of legislative authority, of powers and rights in respect of objects outside the province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted *ab extra.* It is, in their lordships' opinion, in this narrower sense alone that the restriction to provincial objects is to be interpreted. It follows, as the Ontario Legislature has not thought fit to restrict the exercise by the Lieutenant-Governor of the prerogative power to incorporate by letters patent with the result of conferring a capacity analogous to that of a natural person, that the appellant company could accept powers and rights conferred on it by outside authorities.

The conclusions at which their lordships have thus arrived are sufficient to enable them to dispose of this appeal; for according to these conclusions the appellant company had a status which enabled it to accept from the Dominion authorities the right of free mining, and to hold the leases in question and take the benefit of the agreements relating to the locations in the Yukon district, as well as of the license from the Yukon authorities.

A yet larger view of the devolution and distribution of executive power in Canada was suggested in some of the arguments addressed to their lordships from the Bar, and they are aware that this view has been contended for on former occasions in the Dominion. It has been urged in several cases which have occurred that the Governor-General and the Lieutenant-Governors of the provinces, excepting so far as the Royal prerogatives have been reserved expressly or by necessary implication, have the right to exercise them, as though by implication completely handed over and distributed in such a fashion as to cover the whole of the fields to which the self-government of Canada extends. The Governor and the Lieutenant-Governors would thus be more nearly Viceroys than representatives of the Sovereign under the restrictions explained in *Musgrave* v. *Pulido*, 5 App. Cas. 102, 49 L. J. P. C. 20, where it was laid down that, in the case of a Crown Colony, the commission of the Governor-General must in each case be the measure of his executive authority, a principle which, in such a case as that of a self-governing Dominion like Canada, might find its analogy in the terms not only of the commission but of the statute creating the Constitution.

The argument for the larger view concedes that it is the general rule in the construction of statutes that the Crown is not affected unless there be words to that effect, inasmuch as the law made by the Crown with the assent of the Lords and Commons is enacted *primâ facie* for the subject and not for the Sovereign. But this principle of construction it is said cannot apply to an Act the expressed object of which is to grant a Constitution with full legislative and executive powers. In the case of such an Act there is therefore no presumption that the general provisions it contains were not intended to include any matter of prerogative which, in the absence of the rule of construction above stated, would fall within the general words employed. For a Constitution, granted to a dominion for regulating its own affairs in legislation and government generally, cannot be created without dealing with the prerogative, and *The British North America Act* from beginning to end deals with matters of prerogative, for the most part without expressly naming the Sovereign.

If this argument were well-founded it would afford a short cut to the solution of the question which has arisen in this appeal. For under the distribution of the prerogative which

it assumes it would be difficult to see how a Lieutenant-Governor, placed in the position of a Viceroy as regards matters pertaining to the government of his province, could be excluded from the prerogative power of incorporating by charter, unless that power had been expressly taken away by legislation.

But their lordships abstain from discussing at length the question so raised. They will only say that when, if ever, it comes to be argued, points of difficulty will have to be considered. There is no provision in *The British North America Act* corresponding even to sec. 61 of *The Australian Commonwealth Act*, which, subject to the declaration of the discretionary right of delegation by the Sovereign in ch. 1, sec. 2, provides that the executive power, though declared to be in the Sovereign, is yet to be exercisable by the Governor-General. Moreover, in the Canadian Act there are various significant sections, such as sec. 9, which declares the Executive Government and authority over Canada to continue and be vested in the Sovereign; sec. 14, which declares the power of the Sovereign to authorize the Governor-General to appoint deputies; sec. 15, which, differing from sec. 68 of *The Commonwealth Act*, says that the command-in-chief of the naval and military forces in Canada is to be deemed to continue and be vested in the Sovereign; and sec. 16, which says that until the Sovereign otherwise directs, the seat of the Government in Canada shall be Ottawa. These and other provisions of *The British North America Act* appear to preserve prerogative rights of the Crown which would pass if the scheme were that contended for, and to negative the theory that the Governor-General is made a Viceroy in the full sense, and they point to the different conclusion that for the measure of his powers the words of his commission and of the statute itself must be looked to. In the case of *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*, already referred to, it was said by this Board that the provisions of the Act "nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces."

Properly understood, and subject to such express provisions of the Act as transfer what would otherwise remain prerogative powers, their lordships are disposed to agree with this interpretation. It is quite consistent with it to hold that executive power is in many situations which arise under the statu-

tory Constitution of Canada conferred by implication in the grant of legislative power, so that where such situations arise the two kinds of authority are correlative. It follows that to this extent the Crown is bound and the prerogative affected. But such a conclusion is a very different one from the far-reaching principle contended for in the argument in question.

For the reasons which they have assigned earlier in this judgment their lordships will humbly advise His Majesty that this appeal should be allowed, and that the trial of the petition of right should be proceeded with. As these are proceedings arising out of a petition of right with reference to which, under the *Petition of Right Act* of Canada, there is discretion to award costs as against the Crown, the respondent will pay the appellants' costs here and in the Courts below. There will be no order as to the costs of the interveners.

Case III.

Reference Re Insurance Companies.

This is an appeal from a judgment of the Supreme Court of Canada answering certain questions put to the judges by a reference from the Government of the Dominion. The questions so referred were as follows:

1. Are secs. 4 and 70 of *The Insurance Act,* 1910, or any and what part or parts of the said sections, *ultra vires* of the Parliament of Canada?

2. Does sec. 4 of *The Insurance Act,* 1910, operate to prohibit an insurance company incorporated by a foreign State from carrying on the business of insurance within Canada, if such company does not hold a license from the Minister under the said Act, and if such carrying on of the business is confined to a single province?

Sec. 4 is in these terms: "In Canada except as otherwise provided by this Act, no company or underwriters or other person shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action, or proceeding, or file any

claim in insolvency relating to such business, unless it be done by or on behalf of a company or underwriters holding a license from the Minister."

The Minister is defined in the Act to mean the Minister of Finance of the Dominion.

Sec. 10 is an ancillary section which imposes a penalty on every person who contravenes or attempts to contravene the provisions of the above and other sections. Sec. 3 provides that the provisions of the Act shall not apply to any contract of marine insurance effected in Canada by any company authorized to carry on such business within Canada, nor to any company incorporated by an Act of the late province of Canada, or by an Act of the legislature of any province now forming part of Canada, which carries on the business of insurance wholly within the limits of the province by the legislature of which it was incorporated, and which is within the exclusive control of the legislature of such province. Sec. 3 also provides that any such company as is last described may, by leave of the Governor-in-Council, avail itself of the provisions of this Act on complying with the provisions thereof, and that if it so avails itself these provisions shall then apply to it, and such company shall thereafter have the power of transacting its business of insurance throughout Canada. Sec. 12 enacts that no license shall be granted to any individual underwriter or underwriters to carry on any kind of insurance business, excepting in the case of associations of individuals formed upon the plan known as Lloyd's, under which each associate underwriter becomes liable for a proportionate part of the whole amount insured by a policy. The Act contains other restrictive and regulative provisions.

It will be observed that sec. 4 deprives private individuals of their liberty to carry on the business of insurance, even when that business is confined within the limits of a province. It will also be observed that even a provincial company operating within the limits of the province where it has been incorporated cannot, notwithstanding that it may obtain permission from the authorities of another province, operate within that other province without the license of the Dominion Minister. In other words, the capacity is interfered with which, according to the judgment just delivered by their lordships in the case of the Bonanza Company, such a company possesses to take advantage of powers and rights proffered to it by

authorities outside the provincial limits. Such an interference with its status appears to their lordships to interfere with its civil rights within the province of incorporation, as well as with the power of the legislature of every other province to confer civil rights upon it. Private individuals are likewise deprived of civil rights within their provinces.

It must be taken to be now settled that the general authority to make laws for the peace, order, and good government of Canada, which the initial part of sec. 91 of *The British North America Act* confers, does not, unless the subject-matter of legislation falls within some one of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the provincial legislatures by the enumeration in sec. 92. There is only one case, outside the heads enumerated in sec. 91, in which the Dominion Parliament can legislate effectively as regards a province, and that is where the subject-matter lies outside all of the subject-matters enumeratively entrusted to the province under sec. 92. *Russell* v. *The Queen*, 7 App. Cas. 829, 51 L. J. P. C. 77, is an instance of such a case. There the Court considered that the particular subject-matter in question lay outside the provincial powers. What has been said in subsequent cases before this Board makes it clear that it was on this ground alone, and not on the ground that the *Canada Temperance Act* was considered to be authorized as legislation for the regulation of trade and commerce, that the Judicial Committee thought that it should be held that there was constitutional authority for Dominion legislation which imposed conditions of a prohibitory character on the liquor traffic throughout the Dominion. No doubt the *Canada Temperance Act* contemplated in certain events the use of different licensing boards and regulations in different districts, and to this extent legislated in relation to local institutions. But the Judicial Committee appear to have thought that this purpose was subordinate to a still wider and legitimate purpose of establishing a uniform system of legislation for prohibiting the liquor traffic throughout Canada, excepting under restrictive conditions. The case must therefore be regarded as illustrating the principle which is now well established, but none the less ought to be applied only with great caution, that subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial legislatures may in another aspect and for another purpose fall within Domin-

ion legislative jurisdiction. There was a good deal in the *Ontario Liquor License Act* and the powers of regulation which it entrusted to local authorities in the province, which seems to cover part of the field of legislation recognized as belonging to the Dominion in *Russell* v. *The Queen*. But in *Hodge* v. *The Queen*, 9 App. Cas. 117, 53 L. J. P. C. 1, the Judicial Committee had no difficulty in coming to the conclusion that the local licensing system which the Ontario statute sought to set up was within provincial powers. It was only the converse of this proposition to hold, as was done subsequently by this Board, though without giving reasons, that the Dominion licensing statute, known as the *McCarthy Act*, which sought to establish a local licensing system for the liquor traffic throughout Canada, was beyond the powers conferred on the Dominion Parliament by sec. 91. Their lordships think that as the result of these decisions it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces. Sec. 4 of the statute under consideration cannot, in their opinion, be justified under this head. Nor do they think that it can be justified for any such reasons as appear to have prevailed in *Russell* v. *The Queen*. No doubt the business of insurance is a very important one, which has attained to great dimensions in Canada. But this is equally true of other highly important and extensive forms of business in Canada, which are to-day freely transacted under provincial authority. Where *The British North America Act* has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words which would have been unnecessary had the argument for the Dominion Government addressed to the Board from the Bar been well-founded. Where a company is incorporated to carry on the business of insurance throughout Canada, and desires to possess rights and powers to that effect operative apart from further authority, the Dominion Government can incorporate it with such rights and powers, to the full extent explained by the decision in the case of *The John Deere Plow Company* v. *Wharton and Duck* [1915] A. C. 330, 84 L. J. P. C. 64, 7 W. W. R. 706. But if such a company seeks only provincial rights and powers, and is content to trust for the extension of these in other provinces to the Governments of these provinces, it

can at least derive capacity to accept such rights and powers in other provinces from the province of its incorporation, as has been explained in the case of the Bonanza Company.

Their lordships are therefore of opinion that the majority in the Supreme Court were right in answering the first of the two questions referred to them in the affirmative.

The second question is, in substance, whether the Dominion Parliament has jurisdiction to require a foreign company to take out a license from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a single province. To this question their lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in sec. 91, which refer to the regulation of trade and commerce and to aliens. This question also is therefore answered in the affirmative. Their lordships will accordingly humbly advise His Majesty that the questions referred to should be answered as now indicated. Following the usual practice, there will be no order as to costs.

CHAPTER VII.

General Sketch of Early English Constitution.

There can be but little doubt that the germ of the Canadian Constitution, as it is to-day, is to be found in the early institutions of the Teutons.

Primitive Teutonic Constitution.

Professor Freeman describes the primitive Teutonic Constitution as being democratic, purely democratic in the truer, older, and more honourable sense of that much maligned word. "The early glimpses of Teutonic politics set before us three classes of men," he says, "as found in every Teutonic society, the noble, the common freeman, and the slave."

Their Constitution has been described by Tacitus as translated by Freeman in the following words: "They choose their kings on account of their nobility, their leaders on account of their valour. Nor have the kings unbounded or arbitrary powers, and are believed to rule rather by their example than by their right of command. If they are ready, if they are forward, if they are foremost in leading the van, they hold the first place in honour. On small matters the chiefs debate, on greater matters all men; but so that those things, whose final decision rests with the whole people, are first handled by the chiefs. The multitude sits on in such order as it thinks good. Silence is proclaimed by the priests, who have also the right of enforcing it. Presently the king or chief, according to the age of each, according to his birth, according to his glory in war or eloquence, is listened to, speaking rather by the influence of persuasion than by the power of commanding. If their opinions give offence, they are thrust aside with a shout; if they are approved, the hearers clash their spears. It is held to be the most honourable kind of applause to use their weapons to signify approval. It is lawful also in the assembly to bring matters for trial, and to bring charges of capital crime. In the same assembly, chiefs are chosen to administer justice through the districts and villages. Each chief in so doing has a hundred companions of the commons assigned to him, at once his councillors and his authority. Moreover they do no matter of business, public or private, except in arms."

Mark System.

These forefathers of ours cultivated the land upon the mark system, which entailed the annual allotment of the arable land of the community amongst the freemen, whereas the pasture-land was used in common.

Folcland—Bocland.

After the conquest of the early Britons, the land was doubtless divided amongst the simple freemen, whereas a portion of the territory was kept by the chief of the tribe who subsequently emerges as king, as his own private estate.

The land which remained after these allotments was the folcland, which was deemed to be not the property of the king, but the common property of the people at large.

It is indeed probable that the use of the word "folcland" is not here correct, as Vinogradoff has shown conclusively that the real meaning of folcland is land held without any written title and merely under customary law, whilst "bocland" was land which had been granted to individuals by writing, that is by a charter or book.

Allodial Property.

All land which was held by individuals was known as allod, or allodial property, and was deemed to be the absolute property of the person who held it, a characteristic which, as will be later seen, soon disappeared upon the introduction of the feudal system, which involved the holding of land from the king or some other overlord, and placed the ownership of the entire land of the kingdom in the crown.

Townships.

Geographically, the community was divided into townships (tun or vicus). This township was governed as far as local affairs were concerned by an assembly of the freemen who constituted it, and the reeve (gerefa), who was its chief executive officer.

Hundreds.

These townships were grouped together so as to constitute hundreds. The government of the hundred was carried on by a general assembly, which was attended by the thegns or nobles of the hundred and by the reeve and four picked men from each

township. This meeting looked after all business, either civil or criminal, which arose within the boundaries of the hundred.

Shires.

The hundreds were in turn grouped, so as to form shires. The government of the shire was administered by the ealdorman, whom we might describe as the chief nobleman of the county, and the scirgerefa, or, as we would now call him, sheriff.

The function of the sheriff was to represent the king, and so to keep the shire in touch with the central authority. He was the judicial president of the shiremoot, and though originally sharing all authority with the ealdorman, gradually absorbed the direction of all civil matters, whilst the command of the forces of the shire was entrusted to the ealdorman.

The Burg.

The burg, or town, was, in the language of Stubbs, simply a more strictly organized form of the township. "It was probably in a more defensible position; had a ditch or mound instead of the quick set hedge or tun from which the township took its name; and as the tun was originally the fenced homestead of the cultivator, the burg was the fortified house and courtyard of the mighty man—the king, the magistrate or the noble.

Nobility.

After the earliest times, we find in England two forms of nobility, one consisting of eorls, who were noble by birth, and within whose sacred ranks the rest of the people, ceorls, or churls, could never penetrate. The other form of nobility rested its claim, not upon birth, but upon distinction acquired by serving as a personal follower or companion of the lord. Such nobles were originally known as gesiths or companions, but later became known as thegns or servants. The change is easily understood when it is remembered what social position and what material rewards can be won by service to a king. The remnant of this old theory of nobility is still to be seen in the precedence accorded to the nobles who bear the rank of the King's Chamberlain, Master of the Horse, or Lord in Waiting.

This second class of nobility tended to oust the first sort, inasmuch as in those days when the security of neither life nor

property was guaranteed by any more efficient means than that of might, it was clearly the advantage of the ordinary freeman to choose a powerful lord to whom he could attach himself or commend himself, as the phrase ran, yielding to the lord personal service, and often, indeed, giving up to him his own allod or land held in absolute ownership, to receive it back from him as a *beneficium* to be held of the lord, a process which anticipated the final introduction of the feudal system as existent on the continent.

"As the royal power and dignity grew," says Freeman, "it came to be looked on as the highest honour to enter into the personal service of the king. Two results followed service towards the king, a place, that is, in the king's comitatus, became the badge and standard of nobility, and it greatly strengthened the power of the king, and he stood to all the chief men of the kingdom in the relation not only of a political ruler, but of a personal lord, a lord to whose service they were bound by a personal tie, and of whom they held their lands as the gift of his personal bounty. When personal service was deemed honourable, the name of servant was no degradation, and the name became equivalent to the older eorl. The king's thegns, the men who held their land of the king, and were bound to him by the tie of personal service, formed the highest class of nobility. The thanes of mesne lords or bishops and ealdormen, formed the secondary class. A nobility of this kind, there can be no doubt, was so far more liberal than the elder nobility of birth that admission to it is not denied to men of low degree."

Status of Early Villeins.

Between the noble, the freeman, and the slave, there came the villein, who is described by Maitland as follows: They are unfree, but we must not call them slaves; they are not rightless; the law does not treat them as things, it treats them as persons; still they are unfree; they must not leave their lord's land; if they do, he may recapture them and bring them back; the law will aid him in this; it gives him an action for recovering the body of his natives, an action *de nativo habendo*. Generally, if not always, the nativi has land which he holds in villeinage, which he holds by villein services. He has land, but how far he can be said to have a right in this land is a difficult question. One thing is clear—the king's Courts do not protect

that right against his lord. If the lord capriciously chooses to eject him, he has no remedy against his lord in the King's Courts. We find, however, that he is conceived to hold his land by perfectly definite services (Maitland, p. 33). The lord may at any time seize the chattels of his nativi. Again, the lord may imprison the body of his nativus; the king's Courts give no redress; but against maiming and death at the lord's hand they give protection; the life or limb of every man, be he free or unfree, are in the king's protection. To slay or maim him is a felony (Maitland, p. 34).

The Witenagemot.

The supreme council of the nation was known as the Witenagemot. We do not exactly know what is the composition of the Witenagemot. It is spoken of indefinitely as a meeting of the wise men or of the noble great men. It is, perhaps, true that theoretically it was a meeting which every free man had the right to attend, such as that which was described by Tacitus, but as is often the case, the theoretical composition differed considerably from the actual composition. Distance, the difficulty of travel, want of pence, must have all co-operated to prevent a person undertaking a journey to the site of the general meeting, except, perhaps, when the matters to be debated there were of overwhelming importance. The older places of meeting were Westminster, Winchester, and London, and if we imagine a meeting say at Westminster, we would not expect to find there, although entrance is forbidden to no one, any other person than the chief nobles and ecclesiastics of the realm, those officers whose duty it was to be in attendance upon the king, and such ordinary citizens of London and Westminster as curiosity or genuine interest in the public weal might lead to the spot.

The powers of the Witan were considerable. It elected and opposed kings; along with the king it enacted laws, levied taxes, made treaties, and appointed the great officers of church and state, and, moreover, served as a supreme court of justice both in civil and criminal cases. Some of these functions may have been fulfilled by the king personally, but the theory always was that he acted upon the advice of the Witan, but even he did not act individually upon matters of legislation or extraordinary taxation.

Hundred Court.

The Hundred Court was held once a month. The whole body of freeowners of the hundred were entitled to attend as suitors and to act as judges, but it is probable that from the very early days the judicial functions were exercised by representative committees. To this court all persons claiming justice, whether in civil or criminal matters, were bound to make their first application. Here came the king's reeve to collect the wites or fine for every offence to which the king was entitled upon an infringement of the king's peace. Here, too, upon the two occasions in the year in which the king's reeve attended, there was an inquiry into "frank pledge." This was an institution whereby every freeman was compelled to be enrolled in an association of ten men (or "tithing") at the head of which stood "the tithingman." The tithing was collectively responsible for the conduct of its members, thus if a member of a tithing failed to appear to answer for a crime of which he was accused, the other members became liable for the penalty, in default of showing that they had no share in his crime or escape. This seems to have been the earliest form of police policy.

The jurisdiction of the hundred court was frequently broken into by the fact that private franchises were frequently granted to local lords, to hold courts and to administer justice, and indeed sometimes the jurisdiction of whole hundreds was transferred to secular or ecclesiastical lords.

Shiremoot.

The shiremoot met twice a year. To it the twelve senior thegns of the shire made a report on the general condition of the district; the court heard appeals from miscarriage of justice in the hundred courts. In the court the law was declared by the presiding nobles, but the facts were decided either by compurgation or by ordeal. The compurgators were a body of men who might be called "witnesses of character," that is to say, they swore that the accused person was oath-worthy, and thereafter the accused person could clear himself by his own oath.

In those cases where compurgation was not allowed, for example, when a man was caught in the act, or where he failed to produce compurgators, or had been previously guilty of per-

jury, or was not a freeman, he had to go to the ordeal, which was of three kinds, hot iron, hot or cold water, and the corsned, or accursed morsel.

Feudal System.

We have seen that something like the feudal system existed even before the Norman conquest. And now there remains to show how it was that William I. and his son, William II., managed to bring it about that practically all the land in England should come to be held not as allods, but on a feudal tenure. William appropriated all the extensive royal domains, which prior to his time had been regarded more as the property of the nation at large than that of the king; suffered Englishmen who had fought against him to retain their possessions, but probably upon condition of surrendering their allods to him and receiving them back as a re-grant from him. So again after each insurrection against his rule, and they were numerous, the king confiscated the property of the rebels and regranted them upon feudal tenure. It must also be noticed that William in taking for himself all the advantages of the feudal system, also managed to abolish that characteristic of it which was most inimical to the royal power. By the celebrated oath of Salisbury in 1086, he required that all landowners should take the oath of fealty directly to the king, and not merely to the lord of whom they held their land. This provision was in accordance with the old English constitution, but not in accordance with the continental feudal system. Under the latter, the oath of fealty bound the landowner to the lord of whom he held his land only, so that the landowner, in the event of a struggle between his lord and the king, felt bound to follow the standard of his lord.

Under the feudal system, all the lands and tenements in England in the hands of subjects are holden mediately or immediately of the king. There is no longer any such thing as allodial ownership, that is, land can not be owned in the same way as a watch can be owned.

The scheme of the system is as follows: The original grantees of the king hold as tenants in chief of tenants in capite. From such tenants in capite, others again hold land who again may grant portions of their land to others and are then known as mesne lords, and so on, but each and every tenant of land is bound directly to the king by an oath of fealty.

Prior to the Norman conquest, land was not subject to many burdens. Chief amongst those to which it was subject was the *trinoda necessitas,* that was a liability to serve in the fyrd or national militia, and to contribute towards the repair of fortresses and bridges.

After the Norman conquest, a tenant had to do homage to his lord, and to swear an oath of fealty to him, to which, however, there was always a reservation of the faith to his sovereign lord the king. The fiefs, as they were known, were held upon knight service, that is, for every portion of the land which was of the annual value of twenty pounds (known as a knight's fee), the tenant had to supply a properly equipped knight, to serve in the field for forty days at his own expense.

To this were added other incidental burdens, thus the tenant had to pay aids, or contributions, for the purpose of (1) ransoming the lord's person from captivity, (2) making his son a knight, and (3) providing a suitable portion for his eldest daughter on her marriage.

The son of the tenant, when succeeding to the land, had to pay a *relief,* and, moreover, if such son was a son of a tenant in capite, the king was entitled to *primer seisin,* that is to take all the profits of the land for the first year.

If the heir were under age when he succeeded to his father's estate his lord was entitled to wardship, that is, to take all the profits of the estate until the coming of age of the heir, without rendering any account thereof. Also the lord had a right to dispose of the hands of female wards in marriage. If the ward married without the lord's consent, she forfeited double the market value of the marriage; or if she rejected the hand of the husband who was proposed to her by the lord, she forfeited as much money as he was willing to pay down as the price of the alliance.

When a person died without leaving any lawful heirs, either because there were in fact none such, or because he himself had been convicted of felony or treason, the land *escheated* or reverted to the lord by whom it was originally granted.

Besides tenure by knight service, there also was tenure in *free socage,* which indeed is the tenure by which all land is to-day held. The services by which such land is held were fixed and not uncertain, such as the payment of a fixed money rent, or the duty to plow the lord's land for a fixed number of days

in the year. It was not subject to the burdens of wardship or marriage.

There might also be mentioned tenure in burgage, by which tenants in old burghs were held by fixed rents. It might be described as "town socage"; one variety of it is known as Borough English, where the holding descends to the youngest instead of to the eldest son.

Gavelkind is a tenure which exists chiefly in the county of Kent, the chief peculiarity of which is that in the case of intestacy, the land descends to all the sons equally.

Below these tenures came tenure in villeinage, that is tenure of land by the rendering of work in lieu of wages. The general condition of these villeins must have varied from something very much approaching to slavery to that of persons whose only duty was to perform certain agricultural services in return for their land. The tenure slowly passed into what is known as copyhold tenure, which is now, except in theory, practically equivalent to the ordinary socage tenure, the change beginning to take place as early as the time of Henry the Third, and being completely carried out before the reign of Edward the Fourth.

The Curia Regis.

After the Norman Conquest, the Witan remains, though in a slightly feudalized form, under the name of the Curia Regis, but the same name is given also to the council consisting of the greater nobles of the realm and officers of the king's household which follow the king in his movement from place to place. This council acted as a court of justice and decided all appeals, and to it suitors by payment of a fine could have their complaints removed from the older local courts already spoken of.

Thus it will be seen that in early days people considered that royal justice was worth paying for, which must have served to strengthen greatly the position of the king in his continued struggles with the chief nobles, who regarded any infringement of their rights of administering justice with the deepest resentment.

The Curia Regis, being a somewhat unwieldy body, naturally tended to split up into different departments with peculiar duties attached thereto.

The first offshoot from the Curia Regis to become definitely and permanently organized was the Exchequer. This took place in the reign of Henry I. To this department, the sheriffs were accountable for the money which they received on behalf of the Crown. These moneys were, (1) the ferm of the shire, that is the rent of the royal land; (2) the Danegeld, a tax originally imposed to pay the tribute exacted from England by the Danes, but subsequently transmuted into a tax for the purposes of national defence; (3) the fines imposed by the local courts for infringements of the king's peace; (4) money due to the king under the feudal system, such as aids, reliefs and the proceeds in wardship and marriage; (5) tallages, or arbitrary payments imposed by the king upon his own domain lands or upon boroughs; (6) payments made to procure royal justice.

It should be noticed that in this system of taxation most of the taxation was derived almost entirely from land. It was not until the reign of Henry II. that income or personal property was made liable to contribute. This was first done in the case of the Saladin Tithe, in 1188. That king also introduced Scutage, which was a money payment in lieu of the provision of knights to serve in the field. It is probable that in the imposition of this tax, Henry was influenced by the thought that the mercenaries, whose services he could have by means of the proceeds of this tax, would be more reliable than feudal levies, who might be more devoted to the interests of their master than those of the king.

The next offshoot from the Curia Regis was the Court of Common Pleas. It had been found very inconvenient that common pleas, that is, lawsuits between subject and subject, should have to wait trial before the Curia Regis, who followed the king's person, inasmuch as the latter moved about the kingdom to a considerable extent, and was frequently absent in France for long periods at a time. So it was provided by Magna Charta that common pleas should not follow the king, but should be heard at a fixed place, namely, Westminster.

The result of this is, that shortly after Magna Charta, there are in existence three courts, the Court of Exchequer, hearing all matters in dispute as to the king's revenue; (2) the Court of Common Pleas, hearing suits which were merely between subject and subject, and did not concern the king's interests or

the criminal law, and (3) the Court of the King's Bench, hearing all the residue of cases.

The Judges Itinerant.

In the time of Henry I. some of the judges were, upon isolated occasions, appointed by the king to attend upon the sittings of the County Court in order to look after the king's interests, and also to decide complaints of the failure of justice in the lower courts.

In the time of Henry II., 1176, by the Assize of Northampton Henry II. divided the kingdom into six circuits; three judges going upon each; whilst by the Statute of Westminster, in the time of Edward I., regular justices of assize were appointed to supersede the old justices in eyre as they were called. It was the duty of these judges to go into the counties and to hear such cases as might come before them. They sat by virtue of five commissions: (1) of the peace, (2) of oyer and terminer, (3) of gaol delivery, (4) of assize, (5) of nisi prius. The first commission entitled them to hear small criminal matters, the second and third entitled them to hear other criminal cases, and to try such persons as were confined in gaol; the fourth enabled them to try what were known as actions of assize, that is, generally speaking, actions involving the ownership or possession of real property, whilst the fifth gave them power to hear such suits as might have been heard by the king's courts at Westminster. The Commission of Nisi Prius took its name from the writ by which the action was begun, by which the sheriff was directed to send a jury to Westminster by a certain day, unless before (*nisi prius*) that day the judges of the assize came into the county where the cause of action arose.

WRIT FOR THE ASSEMBLING OF THE COUNTY COURT BEFORE THE JUDGES ITINERANT.

The King to the Sheriff of Yorkshire, Greeting:

Summon by good summoners all archbishops, bishops, abbots, priors, earls, barons, knights, and all freeholders from your bailiwick, from each vill four lawful men and the reeve, and from each borough twelve lawful burgesses, throughout your whole bailiwick, and all others who are accustomed and ought to appear before the justices itinerant, that they be present at York on the octave of Trinity Sunday in the Fifteenth

year of our reign, before our beloved and faithful S. de Segrave, Ralph Fitz-Robert, Brian Fitz Alan, William of Lisle, Robert of Lexington, Master Robert of Shardelawe, and William of London, whom we have appointed our justices, to hear and perform our commands. Also at that time, cause to be brought before the said justices all pleas of the crown which have not been tried, and those which have arisen since our justices last went on circuit in those parts, and all attachments concerning those pleas, and all the assizes and all the pleas which are set down for the first assize of the justices, with the writs of the assizes and pleas, so that those assizes and pleas shall not be omitted, on account of any default of yours or of your summons. Also cause it to be proclaimed and made known throughout your whole bailiwick that all the assizes and all the pleas which were appointed a term for a hearing, and have not been brought to an end before our justices at Westminster, or before our justices who last went on circuit in your county to hear all pleas, or before the justices sent thither to hold assizes of novel disseisin and of jail-delivery, shall at that time come before our aforesaid justices, at York, in the same status in which they have remained by our order, or by the order of our aforesaid justices itinerant or our justices of the bench. Summon also all those who have been sheriffs since the last circuit of the aforesaid justices in those parts that they be present at that time and place before our aforesaid justices, with the writs concerning the assizes and the pleas which they received during their term of office, to answer for their term as they ought to answer before the justices itinerant. And have there the summons and this writ.

Witness Hubert de Burgh, etc., at Westminster, the twentieth day of April.

THE WRIT PRÆCIPE.

The King to the Sheriff, Greeting:

Command A. that, lawfully and without delay, he restore to B. one hide of land, in such a town from which the said B. complains that the aforesaid A. is keeping him by force, and if he does not do it, summon him by good summoners, to be before me or my justices, on the morrow after the octave of Easter in such a place, to show cause wherefore he has not done it; and have there the summoners and this writ.

Witness Ranulph de Glanville, at Clarendon.

(See Magna Carta, *infra*).

CHAPTER VIII.

Rise of Responsible Government in Canada.

Representative Government is essentially unstable in character, and in the British Empire has never been a fortunate experiment. It must be carefully distinguished from Responsible Government.

This means that the colony is administered by men who can command the support of a majority in the colonial legislature, not by men who, as in a crown colony, are chosen by the Governor, or by the Secretary of State at Whitehall, and hold office irrespectively of the opinions of the representative assembly where one exists (Anson, v. 2, pt. 2, p. 68).

Canada is the birthplace of colonial responsible government, and there we can trace the growth of its principal features—the acceptance by the Governor of the advice of his responsible ministers, and the presence of those ministers in one or other house of the legislature, their dependence upon a parliamentary majority for their continuance in office, the permanent tenure of office by the civil servant, and his exclusion from the legislature. . . Statutory provision for these essential features is not easily found (Anson, v. 2, pt. 2, p. 67).

It should be noticed that the responsibility of ministers is not merely an individual responsibility. It is a collective responsibility to Parliament and through it to the country at large. "The first work of the Cabinet," says Lord Morley, "as that institution is now understood, is united and indivisible responsibility."

The responsible government of Canada rests on no fundamentally different basis from the responsible government of the United Kingdom, and largely rests upon constitutional practice, enforced by the ultimate sanctions, *e.g.*, by the refusal to pass an Appropriation Act, and not upon parliamentary enactment. For example, the rule of cabinet government, which has been developed in Canada perhaps more perfectly than elsewhere, is carried on under the constitutional usage and under the régime of formal law. Keith, p. 79).

Difference between Settled and Conquered Colonies.

In 1840 there were two prevailing principles with regard to the position of British colonies.

1. That a settler in any place not under legitimate foreign sovereignty, carried with him so much of the law of England as was appropriate to the circumstances in which he found himself; or, to put it another way, so much as was applicable to his situation and the condition of an infant colony. To this was superadded the principles that the money of a subject could only be voted by or the laws changed by a representative assembly. In other words, settled colonies had representative institutions, though they had not yet attained to responsible government.

2. That in the case of conquered or ceded countries, the crown had uncontrolled legislative authority over the colony (see in case of Virginia and Jamaica, *Smith* v. *Brown*, 2 Salk. 666, and *Beaumont* v. *Barrett*, 1 Moore P. C. 75). This, however, could be exercised either by order in council or by charter of justice under the great seal (*Jephson* v. *Riera*, 3 Knapp, 130). Where there was a chance of white settlement, the crown was always willing to grant to conquered or ceded as well as to settled colonies, representative institutions.

Representative institutions, though capable of being granted by the crown, could not be withdrawn by their creator, unless a power of revocation had been reserved in the grant. The withdrawal could only be effected by an Act of the Imperial Parliament (*Campbell* v. *Pulido*, 20 St. Tr. 239).

In settlements made by Englishmen in barbarous countries, they carry with them not only their laws, but the sovereignty of their own state; and those who live amongst them, and become members of their community, become also partakers of and subject to the same laws (*Adv.-Gen. of Bengal* v. *Ranee Surnomoye Dossee*, 2 Moo. P. C. C. N. S. p. 59).

No Act of Parliament made after a colony is planted is construed to extend to it without express words, showing the intention of the legislature to be that it should (*R.* v. *Vaughan*, 4 Burr. p. 2500). It is true that it is only the law of England as it was at the date of settlement that settlers carry with them; subsequent legislation in England altering the law does not affect their rights, unless it is expressly made to extend to the province or the colony (*The Lauderdale Peerage*, 10 A. C. 744).

It is a very difficult thing to decide what laws are adapted to the situation of a colony (see *Whicker* v. *Hume*, 7 H. L. C.

161). One query of importance certainly is, did the law in question originate out of purely local policy or not—was it adapted solely to the mother country in which it was made?

Laws contrary to the fundamental principles of the British Constitution cease at the moment of conquest (30 St. Tr. 742 (*e.g.*, torture).

Upon the cession of French Canada in 1763, the Royal Commission issued to General James Murray, the Captain-General and Governor in Chief of the Province of Quebec, contemplated legislation by the freeholders of the province. Such an assembly was in fact convoked, but it never met. In 1774 a purely nominee legislature was given to Canada by 14 Geo. III. c. 83, known as the Quebec Act. The reason for the omission of a popular assembly is given by Lord North in his defence of the Act in the House of Commons as follows: "The bulk of the inhabitants are Roman Catholics, and to subject them to an assembly composed of a few British subjects would be a great hardship." The oaths of allegiance and supremacy and the declaration against transubstantiation would, of course, make it impossible for a Roman Catholic to sit in the assembly. Lord Thurlow, in his speech on the Act, tells how, in 1764, the grand jury in Quebec lodged a general presentment against all the inhabitants of the colony for being Papists. The Quebec Act provided that in all matters of controversy relative to property and civil rights, resort was to be had to the laws of Canada, except with regard to lands granted by the crown in free or common socage. The criminal law of England was to remain in force, whilst wills could be made either in the English or French forms. A council was constituted to consist of not more than twenty-three, nor less than seventeen members. Of the original twenty-three members, eight were Roman Catholics. The council was empowered to make ordinances for the province, but the power did not extend to the levying of taxes or duties, except of such local rates as were required for purely local purposes. No ordinance concerning religion or imposing a greater punishment than a fine or three months imprisonment was to be valid, until it had been confirmed by the home government. Further, the whole country to the west of old Quebec was brought into the province with the intention of stopping further settlement in those regions, and of establishing uniform regulations for the Indian trade.

The year 1776 is remarkable for the fact that the Privy Council in that year decided that the action of Governor Carleton (afterwards Lord Dorchester) in consulting an inner circle of his council was wrong, and that all members of the Executive Council stood on a footing of equality, and that all business of the council should be executed by it as a whole.

After the treaty of Versailles and the establishment of the American Republic, the influx of Loyalists into Canada and Nova Scotia soon called for a new constitution. These newcomers settled in the Eastern Townships, around Kingston, and along the River St. Lawrence and the Bay of Quinte. The result was the passing of the Constitutional Act of 1791, an endeavour to give a Constitution to Canada "the very image and transcript of that of Great Britain."

In the correspondence of Lord Dorchester as to the contents of the bill, it is interesting to find the following: "Before I conclude, I have to submit to the wisdom of His Majesty's Councils, whether it may not be advisable to establish a general government for His Majesty's Dominions upon this continent, as well as a Governor-General, whereby the united exertions of His Majesty's North American Provinces may more effectually be directed to the general interest, and to the preservation of the unity of the Empire."

The times were not yet ripe. Chief Justice Smith was the parent of the dream. He writes: "I miss in it, however, the expected establishment to put what remains to Great Britain of Her Ancient Dominions in North America, under one general direction, for the united interest and safety of every Branch of the Empire." A regular plan drawn up by the Chief Justice was forwarded to England, but came to nothing. Under this Act, the province was divided into Upper and Lower Canada with separate legislatures, French laws being retained in Lower Canada, except with respect to criminal matters, and English law ruling in Upper Canada. All land in Upper Canada (and in Lower Canada if the grantee desired) were to be held in free and common socage. The legislative council was separated from the executive council, and the members of the former were given a right to hold their seats during their life and good behaviour. The legislature was to be called together once at least every year, and each assembly was to continue for four years, unless sooner dissolved by the Governor. The Governor might give or refuse assent to bills or

reserve them for the pleasure of the crown. Acts might be disallowed within two years after their receipt by the home authorities. The right to impose duties for the regulation of navigation and commerce was reserved to the Imperial authorities, but the proceeds of such duties, if enforced, were to be exclusively applied to the use of the province from which they were derived. The Governor was authorized in making allotments of land to set apart for the use of the Protestant clergy lands as nearly as the circumstances would permit of the like quality of the lands allotted, and as nearly as possible equal in value to the seventh part of such lands. Freeholders with lands to the clear yearly value of forty shillings were given the county franchise, whilst in towns, owners of houses, etc., to the yearly value of £5 sterling, and persons who had paid £10 for a year as tenants were given the right to vote.

In 1806, the offer of the Assembly in Lower Canada to provide the funds for the full payment of the civil list for the year must be noticed. They were well aware that they who pay the piper, may call the tune. Their offer was rejected by Governor Craig on the ground that it had not received the concurrence of the legislative council.

The state of affairs in Lower Canada at that time are described by Christie in the following words:

"The affairs of the colony were guided or misguided by a few rapacious, overbearing and irresponsible officials, without stake or other connection with the country than their interests. Servants of the government, they seemed to imagine themselves princes among the natives, upon whom they affected to look down; estranging them as far as they could from all direct intercourse or intimacy with the Governor, whose confidence, no less than the treasury, it was their policy to monopolise. They saw with dread, as a prelude to the downfall of their power, the offer of the assembly to defray the necessary expenses of the civil government, which, of course, would carry the right of controlling those expenses, and necessarily divest the officials of the possession of the treasury, which constituted their greatness. They wielded the powers and dispensed the patronage of government without any of its responsibility, which rested entirely upon the Governor, while the country had no real or efficient check either upon him or them. In fine, the Governor, however unconscious of it he may have been, was really in the hands of, and ruled by, a clique of officials rioting

on the means of the country, who, however obsequious to him, in appearance, were nevertheless his masters. The government was in fact a bureaucracy, and the Governor little better than a hostage, and the people looked upon and treated as serfs and vassals by their official lords."

The passage of the Constitutional Act of 1791 seems to have stimulated Americans to migrate into Upper Canada, an emigration that was speedily followed by another from the British Islands, chiefly from the Scottish Highlands.

After the war of 1812, the offer of the assembly of Lower Canada to pay for the civil list was accepted. Upon the arrival of the Duke of Richmond as Governor, he made a request for a much increased civil list. This aroused the assembly, who not only refused to vote a permanent civil list, but to specify the particular items of such salary, and also to apportion duties and the proceeds of crown rights, which had been expressly reserved by the home government. The Legislative Council in turn refused to pass the revenue bills in the form sent up to them.

Meantime the question of duties upon the goods which came to Upper Canada *via* the St. Lawrence was a burning question.

In 1817, an agreement had been come to between the two provinces, whereby one-fifth of the duties levied at Quebec were paid over to Upper Canada. The agreement expired in 1819, and the two provinces found it impossible to come to a fresh working agreement.

To remedy all these evils, the Imperial government in 1822 proposed a union of the two Canadas. Owing to the more than strong opposition of the French Canadians and the lukewarmness of the English party, its only real supporters being the British inhabitants of Lower Canada, the proposal was withdrawn.

The Canada Trade Act, 1822, however, embodied the provisions relating to the custom duties, which forbade the imposition of new duties on sea-borne goods without the consent of Upper Canada, and left the proportion of duties payable to either province to be settled by arbitration.

Matters in Lower Canada went from bad to worse, till in 1836 the Assembly claimed responsible government and refused to grant supplies until there had been redress of grievances. "Colonial government, as meaning an irresponsible executive

and a *liberum* veto allowed to a popular Assembly puffed up by ignorance and vanity, had been tried and found wanting" (Egerton). Meanwhile dissatisfaction was increasing in Upper Canada; the existence of the clergy reserves claimed as its exclusive property by the Church of England under the leadership of Archbishop Strachan, at the same time its best friend and worst foe, and the neglect of the colony's demand for the responsibility of officials to the majority of the colony, and of its claim for an elective Legislative Council, rendered that province as ripe for rebellion as its sister province. The rebellions of Papineau and McKenzie were easily suppressed. There followed upon the collapse of these rebellions the visit of Lord Durham to Canada, and the publication of his famous report.

This report surveyed the situation in general, and recommended the immediate union of the two provinces, the ultimate union of all British North America and the granting of full self-government. To carry out the policy of Lord Durham the Union Act of 1840 was passed, but full responsible government was not yet granted. The bill when prepared went to Canada in charge of the Governor-General, Charles Poulett Thomson, afterwards Lord Sydenham, with instructions to obtain information. A fresh bill was drawn up upon his instructions, the form of which seems to have been largely due to Chief Justice Stuart of Lower Canada. This bill aimed at introducing a form of responsible government, which should at the same time preserve the direct responsibility of the Governor to the Colonial Office.

The principles upon which the bill proceeded were stated by Lord John Russell to be "a legislative union of the two provinces—a just regard to the claims of either province in adjusting the terms of that union—the maintenance of the three estates of the provincial legislature—the settlement of a permanent civil list for securing the independence of the judges, and to the executive government that freedom of action which is necessary for the public good—and the establishment of a system of local government by representative bodies, freely elected in the various cities and rural districts."

In the course of another letter, Lord John Russell notes what he conceives to be a sound reason for the refusal of complete responsibility. "The constitution of England, after long struggles and alternate success, has settled into a form of government in which the prerogative of the Crown is undis-

puted, but is never exercised without advice. Hence the exercise only is questioned, and however the use of the authority may be condemned, the authority itself remains untouched.

"This is the practical solution of a great problem, the result of a contest which from 1640 to 1690 shook the monarchy, and disturbed the peace of the country.

"But if we seek to apply such a practice to a colony, we shall at once find ourselves at fault. The power for which a minister is responsible in England, is not his own power, but the power of the Crown, of which he is for the time the organ. It is obvious that the executive councillors of a colony is in a situation totally different. The Governor, under whom he serves, receives his orders from the Crown of England. But can the colonial council be the advisers of the Crown of England? Evidently not, for the Crown has other advisers, for the same functions, and with superior authority.

"It may happen, therefore, that the Governor receives at one and the same time instructions from the Queen, and advice from his executive council, totally at variance with each other. If he is to obey his instructions from England, the parallel of constitutional responsibility entirely fails; if, on the other hand, he is to follow the advice of his council, he is no longer a subordinate officer, but an independent sovereign.

"There are some cases in which the force of these objections is so manifest, that those who at first made no distinction between the constitution of the United Kingdom and that of the colonies admit their strength. I allude to the questions of foreign war, and international relations, whether of trade or diplomacy. It is now said that internal government is alone intended.

"But there are some cases of internal government, in which the honour of the Crown or the faith of Parliament, or the safety of the State, are so seriously involved, that it would not be possible for Her Majesty to delegate her authority to a minister in a colony.

"Every political constitution in which different bodies share the supreme power, is only enabled to exist by the forbearance of those among whom this power is distributed. In this respect the example of England may well be imitated. The Sovereign using the prerogative of the Crown to the utmost extent, and the House of Commons exerting its power of the purse,

to carry all its resolutions into immediate effect, would produce confusion in the country in less than a twelve-month. So in a colony: the Governor thwarting every legitimate proposition of the Assembly and the Assembly continually recurring to its power of refusing supplies, can but disturb all political relations, embarrass trade, and retard the prosperity of the people. Each must exercise a wise moderation. The Governor must only oppose the wishes of the Assembly, where the honour of the Crown or the interests of the Empire are deeply concerned; and the Assembly must be ready to modify some of his measures for the sake of harmony, and from a reverent attachment to the authority of Great Britain."

Sydenham writes that he has done much to put down the cry for responsible government in its inadmissible sense, "namely, the demand that the council shall be responsible to the Assembly, and that the Governor shall be bound by it." . . . "I have not met with anyone who has not at once admitted the absurdity of claiming to put the council over the head of the Governor."

Sydenham would not admit the rule that if a government could not retain the support of a majority of the members of the house, they were bound to resign, but he dictated the following motion:

1. That the head of the executive government of the province, being within the limits of his government the representative of the Sovereign, is responsible to the Imperial authority alone; but that nevertheless the management of our local affairs can only be conducted by him by and with the assistance, counsel and information of subordinate officers in the province.

2. That in order to preserve between the different branches of the provincial parliament that harmony which is essential to the peace, welfare and good government of the province, the chief advisers of the representative of the Sovereign, constituting a provincial administration under him, ought to be men possessed of the confidence of the representatives of the people, thus affording a guarantee that the well-understood wishes and interests of the people, which our gracious Sovereign has declared shall be the rule of the provincial government, will on all occasions be faithfully represented and advocated.

3. That the people of this province have, moreover, a right to expect from such provincial administration the exertion of

their best endeavours, and that the Imperial authority, within the constitutional limits, shall be exercised in the manner most consistent with their well-understood wishes and interests.

In 1843 Sir Charles Metcalfe was opposed to going to the full length with responsible government. Lafontaine and Baldwin, the then leaders of the government, objected to the appointment of a French Canadian, who was objectionable to the former, to the staff of the Governor, and demanded in Metcalfe's words 'that the patronage of the Crown should be surrendered to the council for the purchase of parliamentary support.' What responsible government meant to Metcalfe is very clearly put by Metcalfe in the reply made by him in 1843 to an address from the Warden and Councillors of the Gore District of Upper Canada.

"With reference to your views of responsible government, I cannot tell you how far I concur in them without knowing your meaning, which is not distinctly stated.

"If you mean that the Governor is to have no exercise of his own judgment in the administration of the Government, and is to be a mere tool in the hands of the Council, then I totally disagree with you. That is a condition to which I can never submit, and which Her Majesty's Government, in my opinion, can never sanction.

"If you mean that every word and deed of the Governor is to be previously submitted for the advice of the Council, then you propose what, besides being unnecessary and useless, is utterly impossible, consistently with the due despatch of business.

"If you mean that the patronage of the Crown is to be surrendered for exclusive party purposes, to the Council, instead of being distributed to reward merit, to meet just claims, and to promote the efficiency of the public service, then we are again at issue. Such a surrender of the prerogative of the Crown is, in my opinion, incompatible with the existence of a British colony.

"If you mean that the Governor is an irresponsible officer, who can, without responsibility, adopt the advice of the Council, then you are, I conceive, entirely in error. The undisputed functions of the Governor are such that he is not only one of the hardest-worked servants of the colony, but also has more

responsibilities than any other officer in it. He is responsible to the Crown and Parliament and the people of the mother-country for every act that he performs, or suffers to be done, whether it originate with himself or is adopted on the advice of others; he could not divest himself of that responsibility by pleading the advice of the Council. He is also virtually responsible to the people of this colony; and practically more so than even to the mother-country; every day proves it, and no resolutions can make it otherwise. But if instead of meaning any of the above-stated impossibilities, you mean that the government should be administered according to the well-understood wishes and interests of the people; that the resolutions of September, 1841, should be faithfully adhered to; that it should be competent to the Council to offer advice on all occasions, whether as to patronage or otherwise, and that the Governor should receive it with the attention due to his constitutional advisers; and consult with them on all cases of adequate importance; that there should be a cordial co-operation and sympathy, between him and them; that the Council should be responsible to the Provincial Parliament and people; and that when the acts of the Governor are such as they do not choose to be responsible for, they should be at liberty to resign; then, I entirely agree with you, and see no impracticability in carrying on responsible government in a colony on that footing, provided that the respective parties engaged in the undertaking be guided by moderation, honest purpose, common sense and equitable minds, devoid of party spirit."

Full responsible government was, however, on its way, though it was not destined to prove as effective a panacea as was believed. Indeed the truth seems to be that responsible government demands as a condition of getting the best results party government, *i.e.*, the existence of two distinct and predominant parties. It does not flourish well when parties become groups, and the blending, dissolution, and re-blending of these groups makes instability the feature of government.

The introduction of real responsible government seems to date from the instructions given by Earl Grey to Sir John Harvey, Lieut.-Governor of Nova Scotia, and to Lord Elgin. Earl Grey writes to the former: "I have assumed that those only of the public servants, who are to be regarded as removable on losing the confidence of the Legislature, are to be members of the Executive Council. This I consider to follow from

the principles I have laid down. Those public servants, who hold their offices permanently, must upon that very ground be regarded as subordinate, and ought not to be members of either house of the Legislature, by which they would necessarily be more or less mixed up in party struggles; and, on the other hand, those who are to have the general direction of affairs exercise that function by virtue of their responsibility to the Legislature, which implies their being removable from office, and also that they should be members either of the Legislative Council, and it is necessary that the Governor of the province should, in administering its affairs, have the advice and assistance of those who can command the confidence of the Legislature, and more especially of that branch of the Legislature which directly represents the people.

Responsible government, then, rests upon no special statute or ordinance. No trace is to be found of it in the Royal Instructions issued with the Commission to Sydenham, Metcalfe or Elgin.

On the contrary (see Keith, vol. I. p. 60), down to the termination of the independent existence of Canada as a province, the principle of responsible government rested on nothing more than practice, its binding force on the action of the Governor, who was subject of course to the possibility of his recall by the Imperial Government on the one hand, and the rendering of his position untenable by the Legislature refusing to work with him, on the other.

In 1849, the Canadian legislature, sitting at Montreal, passed by a large majority the Rebellion Losses Bill, compensating citizens, some of them French, in Lower Canada, for loss incurred at the hands of the loyal party during the rebellion of ten years before. The mob of Montreal pelted Lord Elgin because, in execution of his instructions, he gave his assent to the bill on the ground that in Canadian domestic affairs, the Canadian Parliament must be supreme. Responsible government was as yet not fully understood. Lord Elgin's comment is to the point: "The nature of the constitutional doctrines, which practically obtain in this section of the community, is curiously exemplified by the fact that it is not the passage of the Bill by an overwhelming majority of the representatives of the people, or the acquiescence of the Council, but the consent of the Governor, which furnishes the pretext for an exhibition of popular violence."

The repeal of the Corn Laws in 1846, involving the withdrawal of preference in England for Canadian wheat and flour, and the restrictions imposed on colonial shipping by the Navigation Acts, caused an acute commercial crisis culminating in a project for annexation by the United States. These troubles passed away on the repeal of the Navigation Acts in 1849, and the negotiation of a Treaty of Reciprocity in natural products with the States in 1854. The outbreak of the civil war in 1861 increased the demand for Canadian products, and the country prospered until 1865, when the United States, being then wroth with England for her attitude in the civil war, cancelled the treaty. Meanwhile, misunderstanding between French and English and frequent changes of Government (three in three years), made the Union Act unworkable. In 1864 the leaders of both parties united in a coalition ministry to carry Federation. By permission, Canadian delegates attended at Charlottetown, a convention of delegates from Nova Scotia, New Brunswick and Prince Edward Island, summoned to consider a Maritime Union. All the delegates, reinforced by other Newfoundland delegates, met in Quebec in October, 1864, and passed the 72 resolutions, known as the Quebec Resolutions, which were the basis of the B. N. A. Act.

In Nova Scotia representative institutions had been granted as early as 1758, but political power was largely the perquisite of a council of twelve, composed of the Chief Justice, the Anglican Bishop and others of the official class. After a long struggle, the legislative assembly, led by the eloquent and clear-sighted Joseph Howe, won a bloodless victory for responsible government in 1847-48. Portions of a letter written by Earl Grey to Sir John Harvey, the Lieutenant-Governor, have already been quoted.

At the same time New Brunswick received responsible government, Lemuel Allan Wilmot being the protagonist in the successful struggle.

In Prince Edward Island, a representative assembly had been established in 1773. The island did not enter Confederation until 1873.

CHAPTER IX.

Documents Illustrative of the Introduction of Responsible Government into Canada.

(*No. 1.*)

1. Lord Durham's Report (Part).

Such are the lamentable results of the political and social evils which have so long agitated the Canadas; and such is their condition that at the present moment we are called on to take immediate precautions against dangers so alarming as those of rebellion, foreign invasion, and utter exhaustion and depopulation. When I look on the various and deep-rooted causes of mischief which the past inquiry has pointed out as existing in every institution, in the constitutions, and in the very composition of society throughout a great part of these provinces, I almost shrink from the apparent presumption of grappling with these gigantic difficulties. Nor shall I attempt to do so in detail. I rely on the efficacy of reform in the constitutional system by which these colonies are governed, for the removal of every abuse in their administration which defective institutions have engendered. If a system can be devised which shall lay in these countries the foundation of an efficient and popular government, ensure harmony in place of collision between the various powers of the State, and bring the influence of a vigorous public opinion to bear on every detail of public affairs, we may rely on sufficient remedies being found for the present vices of the administrative system.

The preceding pages have sufficiently pointed out the nature of these evils, to the extensive operation of which I attribute the various practical grievances, and the present unsatisfactory condition of the North American colonies. It is not by weakening, but strengthening the influence of the people on its government; by confining within much narrower bounds than those hitherto allotted to it, and not by extending the interference of the Imperial authorities in the details of colonial affairs, that I believe that harmony is to be restored where dissension has so long prevailed; and regularity and vigour, hitherto unknown, introduced into the administration of these provinces. It needs no change in the principles of government, no inven-

tion of a new constitutional theory, to supply the remedy which would, in my opinion, completely remove the existing political disorders. It needs but to follow out consistently the principles of the British constitution, and introduce into the government of these colonies those wise provisions, by which alone the working of the representative system can in any country be rendered harmonious and efficient. We are not to consider the policy of establishing representative government in the North American colonies. That has been irrevocably done; and the experiment of depriving the people of their present constitutional power is not to be thought of. To conduct their government harmoniously, in accordance with its established principles, is now the business of its rulers; and I know not how it is possible to secure that harmony in any other way than by administering the government on those principles which have been found perfectly efficacious in Great Britain. I would not impair a single prerogative of the Crown; on the contrary I believe that the interests of the people of these colonies require the protection of prerogatives which have not hitherto been exercised. But the Crown must, on the other hand, submit to the necessary consequences of representative institutions; and if it has to carry on the government in unison with a representative body, it must consent to carry it on by means of those in whom that representative body has confidence. In England this principle has been so long considered an indisputable and essential part of our constitution, that it has really hardly ever been found necessary to inquire into the means by which its observance is enforced. When a ministry ceases to command a majority in parliament on great questions of policy, its doom is immediately sealed; and it would appear to us as strange to attempt for any time to carry on a government by means of ministers perpetually in a minority, as it would be to pass laws with a majority of votes against them. The ancient constitutional remedies, by impeachment and stoppage of supplies, have never since the reign of William III. been brought into operation for the purpose of removing a ministry. They have never been called for, because in fact it has been the habit of ministers rather to anticipate the occurrence of an absolutely hostile vote, and to retire when supported only by a bare and uncertain majority. If colonial legislatures have frequently stopped the supplies, if they have harrassed public servants by unjust or harsh impeachments, it was because the removal of an unpopu-

lar administration could not be effected in the colonies by those milder indications of a want of confidence which have always sufficed to attain the end in the Mother Country.

The means which have occasionally been proposed in the colonies themselves appear to me by no means calculated to attain the desired end in the best way. These proposals indicate such a want of reliance on the willingness of the Imperial Government to acquiesce in the adoption of a better system as, if warranted, should render an harmonious adjustment of the different powers of the State utterly hopeless. An elective executive council would not only be utterly inconsistent with monarchical government, but would really under the nominal authority of the Crown, deprive the community of one of the great advantages of an hereditary monarchy. Every purpose of popular control might be combined with every advantage of vesting the immediate choice of advisers in the Crown, were the Colonial Governor to be instructed to secure the co-operation of the Assembly is his policy, by intrusting its administration to such men as could command a majority; and if he were given to understand that he need count on no aid from home in any difference with the Assembly, that should not directly involve the relations between the Mother Country and the colony. This change might be effected by a single dispatch containing such instructions; or if any legal enactment were requisite, it would only be one that would render it necessary that the official acts of the Governor should be countersigned by some public functionary. This would induce responsibility for every act of the Government and, as a natural consequence, it would necessitate the substitution of a system of administration, by means of competent heads of departments, for the present rude machinery of our executive council. The Governor, if he wished to retain advisers not possessing the confidence of the existing Assembly, might rely on the effect of an appeal to the people, and, if successful, he might be coerced by a refusal of supplies or his advisers might be terrified by the prospect of impeachment. But there can be no reason for apprehending that either party would enter on a contest, when each would find its interests in the maintenance of harmony; and the abuse of the powers which each would constitutionally possess, would cease when the struggle for larger powers became unnecessary. Nor can I conceive that it would be found impossible or difficult to conduct a Colonial Government with precisely that limitation

of the respective powers which has been so long and so easily maintained in Great Britain.

I know that it has been urged that the principles which are productive of harmony and good government in the Mother Country, are by no means applicable to a colonial dependency. It is said that it is necessary that the administration of a colony should be carried on by persons nominated without any reference to the wishes of its people; that they have to carry into effect the policy, not of that people, but of the authorities at home; and that a colony which should name all its own administrative functionaries would in fact cease to be dependent. I admit that the system which I propose would in fact place the internal government of the colony in the hands of the colonists themselves; and that we should thus leave to them the execution of the laws of which we have long entrusted the making solely to them. Perfectly aware of the value of our colonial possessions and strongly impressed with the necessity of maintaining our connection with them, I know not in what respect it can be desirable that we should interfere with their internal legislation in matters which do not affect their relations with the Mother Country. The matters which so concern us are very few. The constitution of the form of government,—the regulation of foreign relations, and of trade with the Mother Country, the other British colonies and foreign nations, and the disposal of the public lands, are the only points on which the Mother Country requires a control. This control is now sufficiently secured by the authority of the Imperial Legislature; and by the protection which the colony derives from us against foreign enemies; by the beneficial terms which our laws secure to its trade; and by its share of the reciprocal benefits which would be conferred by a wise system of colonization. A perfect subordination, on the part of the colony, on these points is secured by the advantages which it finds in the continuance of its connection with the Empire. It certainly is not strengthened, but greatly weakened, by a vexatious interference on the part of the Home Government with the enactment of laws for regulating the internal concerns of the colony, or in the selection of the persons entrusted with their execution. The colonists may not always know what laws are best for them, or which of their countrymen are the fittest for conducting their affairs; but at least they have a greater interest in coming to right judgment on these points, and will take

greater pains to do so than those whose welfare is remotely and slightly affected by the good or bad legislation of these portions of the Empire. If the colonists make bad laws, and select improper persons to conduct their affairs, they will generally be the only, always the greatest sufferers; and like the people of other countries, they must bear the ills which they bring on themselves, until they choose to apply the remedy. But it surely cannot be the duty or interest of Great Britain to keep a most expensive military possession of these colonies, in order that a Governor or Secretary of State may be able to confer colonial appointments on one rather than another set of persons in the colonies. For this is really the only question of issue. The slightest acquaintance with these colonies proves the fallacy of the common notion that any considerable amount of patronage in them is distributed among strangers from the Mother Country. Whatever inconvenience a consequent frequency of changes among the holders of office may produce is a necessary disadvantage of free government, which will be amply compensated by the perpetual harmony which the system must produce between the people and its rulers. Nor do I fear that the character of the public servants will, in any respect, suffer from a more popular tenure of office. For I can conceive no system so calculated to fill important posts with inefficient persons as the present, in which public opinion is too little consulted in the original appointment, and in which it is almost impossible to remove those who disappoint the expectations of their usefulness, without inflicting a kind of brand on their capacity or integrity.

The important alteration in the policy of the Colonial Government which I recommend, might be wholly or in part effected for the present by the unaided authority of the Crown; and I believe that the great mass of discontent in Upper Canada, which is not directly connected with personal irritation arising out of the incidents of the late troubles, might be dispelled by an assurance that the government of the colony should henceforth be carried on in conformity with the views of the majority in the Assembly. But I think that for the well being of the colonies and the security of the Mother Country, it is necessary that such a change should be rendered more permanent than a momentary sense of the existing difficulties can ensure its being. I cannot believe that persons in power in this country will be restrained from the injudicious interference

with the internal management of these colonies which I deprecate, while they remain the petty divided communities which they now are. The public attention at home is now distracted by the various and sometimes contrary complaints of these different contiguous provinces. Each now urges its demands at different times, and in somewhat different forms, and the interests which each individual complainant represents as in peril are too petty to attract the due attention of the Empire. But if these important and extensive colonies should speak with one voice, if it were felt that every error of our colonial policy must cause a common suffering and a common discontent throughout the whole wide extent of British America, those complaints would never be revoked; because no authority would venture to run counter to the wishes of such a community, except on points absolutely involving the few Imperial interests which it is necessary to remove from the jurisdiction of colonial legislation.

It is necessary that I should also recommend what appears to me an essential limitation on the present powers of the representative bodies in these colonies. I consider good government not to be attainable while the present unrestricted powers of voting public money, and of managing the local expenditure of the community, are lodged in the hands of an Assembly. As long as revenue is raised, which leaves a large surplus after the payment of the necessary expenses of the civil government, and as long as any member of the Assembly may, without restriction, propose a vote of public money, so long will the Assembly retain in its hands the powers which it everywhere abuses, of misapplying that money. The prerogative of the Crown which is constantly exercised in Great Britain for the real protection of the people, ought never to have been waived in the colonies; and if the rule of the Imperial Parliament, that no money vote should be proposed without the previous consent of the Crown, were introduced into these colonies, it might be wisely employed in protecting the public interests, now frequently sacrificed in that scramble for local appropriations which chiefly serves to give an undue influence to particular individuals or parties.

No. 2.

OPINION OF CROWN LAW OFFICERS IN 1755.

Pursuant to your lordships' desire signified to us by Mr. Hill in his letter of the 31st of March last, setting forth that

a doubt having arisen whether the Governor and Council of His Majesty's province of Nova Scotia have a power of enacting laws within the said province, and Jonathan Belcher, Esq., having transmitted to your lordships his observations thereupon, inclosing to us a copy of the said observations, together with copies of several clauses in the commission and instructions of the said Governor of that province referred to (all which are herewith returned) and desiring our opinion, whether the said Governor and Council have or have not a power to enact laws for the public peace, welfare and good government of the said province and the people and the inhabitants thereof.

We have taken the said observations and clauses into our consideration and are humbly of opinion that the Governor and Council alone are not authorized by His Majesty to make laws till there can be an Assembly.

His Majesty has ordered the Government of the infant Colony to be pursuant to his commission and instructions and such further directions as he should give under his sign manuel or by Order-in-Council.

All of which is humbly submitted to your lordships' consideration.

(Signed),

WM. MURRAY.

April 29th, 1755. RICH'D LLOYD.

No. 3.

LORD MANSFIELD'S JUDGMENT IN CAMPBELL V. HALL, 1774.

The case of the Island of Grenada; in relation to the payment of four and one-half in the hundred of goods imported therefrom; between Alexander Campbell, Esq., plaintiff, and Wm. Hall, Esq., defendant, in the Court of King's Bench, before Lord Chief Justice Mansfield: 15 George III., A.D. 1774.

November 28th.

The unanimous judgment of the Court was this day given by Lord Mansfield, as follows:—

This is an action brought by the plaintiff, Alexander Campbell, who is a natural-born subject of Great Britain, and who, upon the third of May, 1763, purchased lands in the Island of Grenada; and it is brought against the defendant, William

Hall, who was collector for His Majesty at the time of levying the import of a duty of four and a half per cent. upon goods exported from the Island of Grenada. The action is to recover a sum of money, which was levied by the defendant and paid by the plaintiff, as this duty of four and a half per cent. upon sugars, which were exported from the Island of Grenada, from the estate and by the consignment of the plaintiff.

The action is an action for money had and received; and it is brought upon this ground, namely, that the money was paid to the defendant without consideration, the duty for which he received it not having been imposed by lawful or sufficient authority to warrant the same.

And it is stated in the special verdict that the money is not paid over, but continues in the defendant's hands, by consent of the Attorney-General, for His Majesty, in order that the question may be tried.

The special verdict states Grenada to have been conquered by the British arms from the French King in 1762; that the island was ceded by capitulation; and that the capitulation upon which it surrendered was by reference to the capitulation upon which the island of Martinico had been surrendered on the 7th of February, 1762.

The special verdict then states some articles of that capitulation, particularly the fifth, which grants that Martinico should continue to be governed by its own laws till His Majesty's pleasure be known. It next states the sixth article, where, to a demand of the inhabitants of Grenada requiring that they, as also the religious orders of both sexes, should be maintained in the property of their effects, moveable and immoveable, of what nature soever, and that they should be preserved in their privileges, rights, honours, and exemptions, the answer is that the inhabitants, being subjects of Great Britain, will enjoy their properties and the same privileges as in the other His Majesty's Leeward Islands.

Then it states another article of the capitulation, namely, the 7th article, by which they demand that they shall pay no other duties than what they before paid to the French King; that the capitation tax shall be the same, and that the expenses of the courts of justice, and of the administration of government, should be paid out of the King's demesne: in answer to which they are referred to the answer I have stated,

as given in the foreign article; that is, being subjects they will be entitled in like manner as the other His Majesty's subjects in the British Leeward Islands.

The next thing stated in the special verdict is the treaty of peace signed on the 10th of February, 1763; and it states that part of the treaty of peace by which the Island of Grenada is ceded, and other articles not material.

The next and material instrument which they state is a proclamation under the Great Seal, bearing date the 7th of October, 1763, reciting thus:

"Whereas it will greatly contribute to the settling of our said islands, of which Grenada is one, that they be informed of our love and paternal care for the liberties and rights of those who are, or shall be, inhabitants thereof; we have thought fit to publish and declare by this our proclamation, that we have by our letters patent under our Great Seal of Great Britain, whereby our said governments are constituted, given express power and direction to our governors of our said colonies respectively, that so soon as the state and circumstances of the said colonies will admit thereof, they shall, with the advice and consent of our said council summon and call general assemblies, in such manner and form as is used in the other colonies under our immediate government. And we have also given power to the said governors, with the advice and consent of our said council and assembly of representatives as aforesaid, to make, constitute, and ordain laws, statutes, and ordinances for the public peace, welfare and good government of our said colonies and the inhabitants thereof, as near as may be agreeable to the laws of England, and under such regulations and restrictions as are used in our other colonies."

Then follow letters patent under the Great Seal, or rather a proclamation of the 26th of March, 1764, whereby the King recites, that he had ordered a survey and division of the ceded islands, as an invitation to all purchasers to come and purchase upon certain terms and conditions specified in that proclamation.

The next instrument stated in the verdict is the letters patent bearing date the 9th of April, 1764. In these letters there is a commission appointing General Melville Governor of the island of Grenada, with power to summon an assembly as soon as the situation and circumstances of the island would admit; and to make laws in all the usual forms with reference

to the manner of the other assemblies of the King's provinces in America.

The Governor arrived in Grenada on the 14th of December, 1764; before the end of 1765, the particular day not stated, an assembly actually met; but before the arrival of the Governor at Grenada, indeed, before his departure from London, there is another instrument upon the validity of which the whole question turns, which instrument contains letters patent under the Great Seal, bearing date the 20th of July, 1764, and reciting that in Barbadoes, and in all the British Leeward Islands, a duty of four and a half per cent. was paid upon goods exported; and reciting further:

"Whereas it is reasonable and expedient, and of importance to our other sugar islands, that the like duties should take place in our said island of Grenada; we have thought fit, and our royal will and pleasure is, and we do hereby, by virtue of our prerogative royal, order, direct, and appoint that an import or custom of four and a half per cent. in specie shall, from and after the 29th day of September next ensuing, the date of these presents, be raised and paid to us, our heirs and successors, for and upon all dead commodities of the growth or produce of our said island of Grenada that shall be shipped off from the same, in lieu of all customs and impost duties hitherto collected upon goods imported and exported into and out of the said island, under the authority of his Most Christian Majesty, and that the same shall be collected, &c."; then it goes on with reference to the island of Barbadoes, and the other Leeward islands.

The jury find that in fact such duty of four and a half per cent. is paid to His Majesty in all the British Leeward Islands. And they find several Acts of Assembly which are relative to the several islands, and which I shall not state, as they are public, and every gentleman may have access to them.

These letters patent of the 20th of July, 1764, with what I stated in the opening, are all that is material in this special verdict.

Upon the whole of the case this general question arises, being the substance of what is submitted to the Court by the verdict: "Whether these letters patent of the 20th of July, 1764, are good and valid to abrogate the French duties, and in lieu thereof to impose this duty of four and a half per cent.,

which is paid by all the Leeward islands subject to his Majesty."

That the letters are void has been contended at the bar, upon two points: (1) That although they had been made before the proclamation of the 7th of October, 1763, the King by his prerogative could not have imposed them; and (2) that, although the King had sufficient authority before the 7th of October, 1763, he had divested himself of that authority by the proclamation of that date.

A great deal has been said, and authorities have been cited relative to propositions in which both sides exactly agree, or which are too clear to be denied. The stating of these will lead us to the solution of the first point.

I will state the propositions at large:—

1. A country conquered by the British arms becomes a dominion of the King in the right of his Crown, and therefore necessarily subject to the legislative power of the Parliament of Great Britain.

2. The conquered inhabitants once received into the conqueror's protection become subjects; and are universally to be considered in that light, not as enemies or aliens.

3. Articles of capitulation, upon which the country is surrendered, and treaties of peace by which it is ceded, are sacred and inviolate, according to their true intent and meaning.

4. The law and legislation of every dominion equally affects all persons and property within the limits thereof, and is the true rule for the decision of all questions which arise there. Whoever purchases, sues, or lives there, puts himself under the laws of the place, and in the situation of its inhabitants. An Englishman in Ireland, Minorca, the Isle of Man, or the Plantations, has no privilege distinct from the natives while he continues there.

5. The laws of a conquered country continue in force until they are altered by the conqueror. The justice and antiquity of this maxim are incontrovertible; and the absurd exception as to pagans mentioned in Calvin's case, shows the universality and antiquity of the maxim. That exception could not exist before the Christian era, and in all probability arose from the mad enthusiasm of the Crusades. In the present case the capitulation expressly provided and agrees that they shall con-

tinue to be governed by their own laws, until his Majesty's pleasure be further known.

6. If the King has power (and, when I say "the King," I mean in this case "the King without the concurrence of Parliament") to alter the old and to make new laws for a conquered country—this being a power subordinate to his own authority as a part of the supreme legislature and parliament—he can make none which are contrary to fundamental principles: he cannot exempt an inhabitant from the laws of trade, or the authority of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances that might be put.

The present Proclamation is an Act of this subordinate legislative power. If it had been made before the 7th of October, 1763, it would have been made on the most reasonable and equitable grounds, putting the island of Grenada as to duties on the same footing as the other islands.

If Grenada paid more duties, the injury would have been to her; if less, it must have been detrimental to the other islands; nay, it would have been carrying the capitulation into execution, which gave the people of Grenada hopes that if any new duties were laid on, their condition would be the same as that of the other Leeward islands.

The only question which remains on this first point then is, whether the King of himself had power to make such a change between the 10th of February, 1763, the day the treaty was signed, and the 7th of October, 1763.

Taking the above propositions to be granted, he has a legislative power over a conquered country, limited to him by the constitution, and subordinate to the constitution of parliament. It is left by the constitution to the King's authority to grant or refuse a capitulation. If he refuses, and puts the inhabitants to the sword or exterminates them, all the lands belong to him; and if he plants a colony, the new settlers share the land between them, subject to the prerogative of the conqueror. If he receives the inhabitants under his protection and grants them their property, he has power to fix such terms and conditions as he thinks proper. He is entrusted with making peace at his discretion; and he may detain the conquest, or yield it up, on such condition as he pleases. These powers no man ever disputed, neither has it hitherto been con-

troverted that the King might change part or the whole of the law or political form of government of a conquered nation.

To go into the history of conquests made by the Crown of England. The alteration of the laws of Ireland has been much discussed by lawyers and writers of great fame at different periods of time; but no man ever said the change was made by the parliament of England; no man, unless perhaps Mr. Molyneux, ever said the King could not do it. The fact, in truth, after all the researches that have been made, comes out clearly to be as laid down by Lord Chief Justice Vaughan, that Ireland received the laws of England by the charters and commands of Henry II., King John, Henry III., and he adds an *et cetera* to take in Edward I., and the successors of the princes named. That the charter of 12 King John was by assent of a parliament of Ireland, he shows clearly to be a mistake. Whenever the first parliament was called in Ireland, that change in their constitution was without an act of the parliament of England, and therefore must have been derived from the King.

Mr. Barrington is well warranted in saying that the 12th of Edward I., called the "Statute of Wales," is certainly no more than a regulation made by the King as conqueror, for the government of the country, which, the preamble says, was then totally subdued; and, however for purposes of policy he might think fit to claim it as a fief appertaining to the realm of England, he could never think himself entitled to make laws without assent of parliament to bind the subjects of any part of the realm. Therefore as he did make laws for Wales without assent of parliament, the clear consequence is that he governed it as a conquest: which was his title in fact, and the feudal right was but a fiction.

Berwick, after the conquest of it, was governed by charters from the Crown, till the reign of James I., without interposition of parliament.

Whatever changes were made in the laws of Gascony, Guyenne, and Calais must have been under the King's authority; if by act of parliament, that act would be extant, for they were conquered in the reign of King Edward III.; and all the acts from that reign to the present time are extant; and in some acts of parliament there are commercial regulations relative to.

each of the conquests which I have named; none making any change in their constitution and laws, and particularly with regard to Calais, which is alluded to as if its laws were considered as given by the Crown. Yet as to Calais, there was a great change made in the constitution: for the inhabitants were summoned by writ to send burgesses to the English parliament and as this was not by act of parliament, it must have been by the sole act of the King.

Besides the garrison there are inhabitants, property, and trade at Gibraltar; the King, ever since that conquest, has from time to time made orders and regulations suitable to the condition of those who live, trade, or enjoy property in a garrison town.

Mr. Attorney-General has alluded to a variety of instances, several within these twenty years, in which the King has exercised legislation over Minorca. In Minorca, it has appeared lately, there are and have been for years back a great many inhabitants of worth and a great trade carried on. If the King does it there as coming in the place of the King of Spain, because their old constitution continues (which by the by is another proof that the constitution of England does not necessarily follow a conquest by the King of England), the same argument applies here; for before the 7th of October, 1763, the constitution of Grenada continued, and the King stood in the place of their former sovereign.

After the conquest of New York, in which most of the old Dutch inhabitants remained, King Charles II. changed its constitution and political form of government, and granted it to the Duke of York, to hold from his Crown under all the regulations contained in the letters patent.

It is not to be wondered that an adjudged case in point is not to be found; no dispute ever was started before upon the King's legislative right over a conquest; it never was denied in a court of law or equity in Westminster Hall, never was questioned in parliament. Lord Coke's report of the arguments and resolutions of the judges in Calvin's case lays it down as clear (and that strange extra judicial opinion, as to a conquest from a pagan country, will not make reason not to be reason, and law not to be law as to the rest). The book says, "If a King"—I omit the distinction between a Christain and an infidel kingdom, which as to this purpose is wholly groundless, and most deservedly exploded—"If a King comes

to a kingdom by conquest, he may, at his pleasure, alter and change the laws of that kingdom; but, until he doth make an alteration of those laws, the ancient laws of that kingdom shall remain; but if a King hath a kingdom by title of descent, then, seeing that by the laws of that kingdom he doth inherit the kingdom, he cannot change those laws himself without consent of parliament." It is plain that he speaks of his own country where there is a parliament. Also, "if a King hath a kingdom by conquest, as King Henry the Second had Ireland, after King John had given to them, being under his obedience and subjection, the laws of England for the government of that country, no succeeding King could alter the same without parliament." Which is very just, and it necessarily included that King John himself could not alter the grant of the laws of England.

Besides this, the authority of the two great names has been cited, who took the proposition for granted. And though opinions of counsel, whether acting officially in a public charge or in private, are not properly authority on which to found a decision, yet I cite them—not to establish so clear a point, but to show that when it has been matter of legal enquiry, the answer it has received, by gentlemen of eminent character and abilities in the profession, has been immediately and without hesitation, and conformable to these principles. In 1722, the assembly of Jamaica refusing the usual supplies, it was referred to Sir Philip Yorke and Sir Clement Wearge, what was to be done if they should persist in this refusal. Their answer is—"If Jamaica was still to be considered as a conquered island, the King had a right to levy taxes upon the inhabitants; but, if it was to be considered in the same light as the other colonies, no tax could be imposed upon the inhabitants, but by an assembly of the island, or by an act of parliament." The distinction in law between a conquered country and a colony they held to be clear and indisputable; whether, as to the case before them of Jamaica, that island remained a conquest or was made a colony, they had not examined. I have, upon former occasions, traced the constitution of Jamaica as far as there are books or papers in the offices; I cannot find that any Spaniard remained upon the island so late as the Restoration; if any, they were very few. A gentleman to whom I put the question on one of the arguments in this cause, said he knew of no Spanish names among the white inhabitants of Jamaica;

but there were amongst the negroes. The King, I mean Charles the Second, after the Restoration invited settlers by proclamation, promising them his protection. He made grants of land. He appointed at first a governor and council only; afterwards he granted a commission to the governor to call an assembly. The constitution of every province immediately under the King has arisen in the same manner; not by grants, but by commissions, to call assemblies. And, therefore, all the Spaniards having left the island, or having been killed or driven out of it, Jamaica from the first settling was an English colony, who under the authority of the King planted a vacant island, belonging to him by right of his Crown; like the cases of the islands of St. Helena and St. John, mentioned by Mr. Attorney-General.

A maxim of constitutional law, as declared by all the judges in Calvin's case, and which two such men in modern times as Sir Philip Yorke and Sir Clement Wearge took for granted, will acquire some authority, even if there were anything which otherwise made it doubtful; but on the contrary no book, no saying of a judge, no, not even an opinion of any counsel, public or private, has been cited; no instance is to be found in any period of our history where it was ever questioned.

The counsel for the plaintiff undoubtedly laboured this point from a diffidence of what might be our opinion on the second question. But upon the second point, after full consideration, we are of the opinion that before the letters patent of the 20th of July, 1764, the King had precluded himself from an exercise of the legislative authority which he had before by virtue of his prerogative over the island of Grenada.

The first and material instrument is the proclamation of the 7th of October, 1763. See what it is that the King there says, and with what view he says it; how and to what he engages himself and pledges his word: "Whereas it will greatly contribute to the speedy settling our said new governments, that our loving subjects should be informed of our paternal care for the security of the liberty and properties of those who are, and shall become, inhabitants thereof; we have thought fit to publish and declare by this our proclamation, that we have in the letters patent under our Great Seal of Great Britain, by which the said governments are constituted, given express power and direction to our governors of our said colonies respectively, that, so soon as the state and circumstances of the

said colonies will admit thereof, they shall, with the advice and consent of the members of our council, summon and call general assemblies" (and then follow the directions for that purpose). And to what end? "To make, constitute, and ordain laws, statutes, and ordinances for the public peace, welfare, and good government of our said colonies," of which this of Grenada is one, "and of the people and inhabitants thereof, as near as may be agreeable to the laws of England." With what view is the promise given? To invite settlers; to invite subjects. Why? The reason given. They may think their liberties and properties more secure when they have a legislative assembly than under a governor and council only. The governor and council depending on the King, he can recall them at pleasure, and give a new frame to the constitution; but not so of the other, which has a negative on those parts of the legislature which depend on the King. Therefore that assurance is given them for the security of their liberty and properties, and with a view to invite them to go and settle there after this proclamation that assured them of the constitution under which they were to live.

The next act is of the 26th of March, 1764, which the constitution having been established by proclamation, invites further such as shall be disposed to come and purchase, to live under the constitution. It states certain terms and conditions on which the allotments were to be taken, established with a view to permanent colonization and the increase and cultivation of the new settlement. For further confirmation of all this, on the 9th of April, 1764, three months before the impost in question was imposed, there is an actual commission to Governor Melville, to call an assembly as soon as the state and circumstances of the island should admit. You will observe in the proclamation there is no legislature reserved to be exercised by the King, or by the governor and council under his authority, or in any other method or manner, until the assembly should be called: the promise imports the contrary; for whatever construction is to be put upon it (which perhaps it may be somewhat difficult to pursue through all the cases to which it may be applied), it apparently considers laws then in being in the island, and to be administered by courts of justice; not an interposition of legislative authority between the time of the promise and of calling the assembly. It does not appear from the special verdict when the first assembly

was called; it must have been in about a year at farthest from the Governor's arrival, for the jury find he arrived in December, 1764, and that an assembly was held about the latter end of the year 1765. So that there appears to have been nothing in the state and circumstances of the island to prevent calling an assembly.

We therefore think that, by the two proclamations and the commission to Governor Melville, the King had immediately and irrevocably granted to all who were or should become inhabitants, or who had or should have property, in the island of Grenada—in general, to all whom it might concern—that the subordinate legislation over the island should be exercised by an assembly, with the consent of the Governor and council, in like manner as in the other provinces under the King.

Therefore, though the right of the King to have levied taxes on a conquered country, subject to him in right of his crown, was good, and the duty reasonable, equitable, and expedient, and, according to the finding of the verdict, paid in Barbadoes and all the other Leeward islands; yet by the inadvertency of the King's servants in the order in which the several instruments passed the office (for the patent of the 20th of July, 1764, for raising the impost stated, should have been first), the order is inverted, and the last we think contrary to and a violation of the first, and therefore void. How proper soever the thing may be respecting the object of these letters patent of the 26th of July, 1764, it can only now be done, to use the words of Sir Philip Yorke and Sir Clement Wearg, "by the assembly of the island, or by an act of the Parliament of Great Britain."

The consequence is, judgment must be given for the plaintiff.

CHAPTER X.

PARLIAMENT FROM THE EARLIEST TIMES.

Historical Sketch.

The passage of the Curia Regis on its judicial side has been traced, *supra,* and now is an appropriate time to draw attention to the many different meanings that have been attached to the words Curia Regis.

As we have seen, the name is given, (1) to the council which succeeded the Witan, and indeed may be said to be the Witan in a feudalized form, the council of the tenants-in-chief, the *Commune Concilium* of the Magna Charta, the *Magnum Concilium,* the National Council, the House of Lords of to-day; (2) to a permanent council which remained about the King's person, consisting of the great nobles, the officers of the King's household, *i.e.,* the justice or chancellor, treasurer, and some or all of the judges, the King's Council *par excellence,* in days to come to be known, from which the King's courts were to branch off, in days to come to be known as the Continual Council, *Concilium Ordinarum,* the Council, the Privy Council; (3) after the King's courts split off to the King's Bench the court still held *coram rege,* as distinct from the Court of Common Pleas, the Common Bench, whose sittings were held in a fixed place.

In early days there was not the same marked differences between executive, legislative, and judicial functions, as there is to-day. In the earliest times there was but little legislation, and taxation, as we know it to-day, hence it is that both the National Council and the Continual Council (I use these terms not because they are correct terms to use with reference to every period of English history, but because they seem to me to convey of themselves more than the other names which are given to the Councils, the essential differences between them) claimed executive, legislative and judicial functions, hence it is, also, that the House of Lords is to-day a member of the legislative body (like the House of Commons), and is also (unlike the House of Commons), a court of law, both with original jurisdiction (trial of peers) and appellate jurisdiction, whilst the (Privy) Continual Council exercises great executive power,

via proclamation and orders-in-council, legislative power in the case of Crown colonies, and judicial power as the final court of appeals for colonies and other places.

The extinction of the original judicial jurisdiction of the Continual Council is dealt with under the heading of Privy Council; its appellate judicial jurisdiction survives in case of colonies, Isle of Man, the Channel Islands, India, etc. The legislative functions of the Continual Council only survive in the case of Crown colonies. This is further dealt with under Proclamations.

The executive functions of the Privy Council survive either in the cabinet, or in the passing of orders-in-council, as the formal expression of the royal or executive will.

The original judicial jurisdiction of the National Council survives in the trial of peers by the House of Lords and impeachment; its appellate jurisdiction survives as a final court of appeal for Great Britain and Ireland.

The legislative functions of the National Council survive in the House of Lords, and are dealt with in the next note on Legislation.

Owing to the necessity of the executive being on the spot for action, the executive power of the National Council can never have been extensive, they were but infrequently summoned.

Legislation.

In theory the National Council seems to have consisted of all the King's tenants in *capite,* but it is more than probable that with the exception of earls, bishops and the principal abbots, the King sent his writ only to those whose presence he desired, and indeed the duty of attending the assemblies must have been viewed by the majority of tenants-in-*capite,* as a burden, rather than as a privilege. They could come, but they also could stay away. (See the provisions of Magna Charta summoning the archbishops, bishops, abbots, earls and majores barones individually, and the rest of the tenants-in-*capite* generally through the sheriff.)

Laws were passed by these councils, such as the Constitutions of Clarendon, the Grand Assize, the Assizes of Clarendon and Northampton, but as Maitland reminds us, the King only "professedly legislates by the counsel and consent of the arch-

bishops, bishops, barons, earls and nobles of England—by the petition and advice of his bishops and all his barons, and so forth. The counsel and consent may still have been little more than a ceremony—the exacting power was with the King—and he could put in respite or dispense with the ordinances that were issued. The tyranny of John after the discipline of Henry was what was needed to turn this right of joining in legislation into a reality. In form the charter is a charter, a free grant by the King, in reality a code of reforming laws passed by the whole body of bishops and barons, and thrust upon a reluctant king."

That laws should be passed without consulting the commonalty of the realm never struck the people of the day as anything remarkable. It was only when questions of taxation were to the fore, that questions of representation arose. From the earliest time these ideas are inseparable. In 1198 Hugh of Lincoln will not pay a tax, because he and others have not consented to its imposition. When the Saladin tithe is collected in 1188, a jury of neighbours settles the amount in each case, but no commoners attend the National Council, till 1213, when after John's submission to the Pope, bishops, barons and four men and the reeve from each township on the royal demesne go to St. Albans to a council. This is the germ of popular representation,

In 1213 King John, by his writ to the sheriff, directed the election of four discreet knights in each shire to come to *ad loquendum nobiscum de negotiis regni nostri.*

The name Parliament, however, appears with respect to a National Council in 1246 at London.

In 1254 when Henry III. was absent in Gascony, his regents summoned two lawful and discreet knights from each county, "whom the men of the county shall have chosen for this purpose in the place of all and each of them" (*"quos iidem comitatus ad hoc eligerint, vice omnium et singulorum, eorundum comitatum"*). The purpose of their coming together is to consider what aid they will grant the king." Here can be seen distinguishing features of modern parliaments, taxation, election, representation, *i.e.*, taxation by elected representatives.

In 1264, Simon de Montford summoned to London two discreet knights for each shire, and two citizens from each city, and two burgesses from each borough.

The year 1295 "gives us the model for all future parliaments. The archbishops and bishops are directed to bring the heads of their chapters, their archdeacons, one proctor for the clergy of each cathedral, and two for the clergy of each diocese. Every sheriff is to cause two knights of each shire, two citizens of each city and two burgesses of each borough to be elected. Seven earls and forty-one barons are summoned by name. The clergy and baronage are summoned to treat, ordain and execute, the representatives of the commons are to bring full powers from those whom they represent to execute (*ad faciendum*) what should be ordained by common counsel. . . . Thus before the end of the thirteenth century the national assembly is ceasing to be a feudal court; it is becoming an assembly of the estates of the realm (clergy, barons and commons), that is to say, according to the theory of the time, of all sorts and conditions of men."

Even after 1295, it is not easy to distinguish between legislation by the King in Council, *i.e.*, in the National Council or Assembly of Magnates, and by the King in Parliament. The former ordinarily legislated by ordinance embodied in letters patent, and both temporary and revocable, while the latter by statute intended to be permanent and engrossed on the statute roll (begun in the reign of Edward I.). The Commons sometimes even preferred legislation by ordinance, thus in Edward III.'s reign (1363), they expressed a preference for sumptuary legislation "by way of ordinance, and not by way of statute, in order that if anything should need amendment, it might be amended at the next parliament," though it is true that in 1353 the Commons objected to the Ordinance of the Staple (prohibiting English merchants from exporting wool upon the pain of death), and asked that "the said articles might be recited at the next Parliament and entered upon the Parliament Roll, for this cause that ordinances and agreements made in council are not of record, as if they had been made in a general Parliament."

It seems to be clearly established that in the earliest days the statutes passed in Parliament did not necessarily require to be assented to by the Commons; at any rate in the cases of statutes founded on the petition of the clergy (who ceased to attend Parliament in 1341).

Parliamentary legislation was effected in the early stages by a petition from the Commons, to which the King replied

le roy le veult. The matter then left the hands of the Commons, and came into those of the King in Council, who might shelve the matter altogether or pass a statute (or ordinance, if the matter were only of temporary importance), which only in part corresponded with the terms of the petition, or add to it a power to the King to suspend or dispense with its operation.

In the reign of Henry V. (1414), the House of Commons petitioned the King, that their petitions should not be changed. The petition is of more than ordinary interest, as it was the first petition written in English. The petition first set out that it had ever been the liberty and freedom of the House of Commons that there should be no statute or law made unless with their assent; and then proceeded as follows:—'Consideringe that the Comune of youre lond, the whiche that is, and ever hath be, a membre of youre Parlement, ben as well Assentirs as Peticioners, that fro this tyme foreward, by compleynte of the Comune of eny myschief axkynge remedie by mouthie of their speker for the Comune, other ellys by Petition writen, that ther never be no Lawe made theruppon, and engrosed as Statute and Lawe, nother by addicions, nother by diminucions, by no maner of termes ne termes, the whiche that sholde chaunge the sentence, and the entente axked by the speker mouthe, or the Petitions biforesaid yeven up in writyng by the manere forsaid, withoute assent of the forsaid Comune. Considerynge our soverain lord, that it is not in no wyse the entente of your Comunes, zif hit be so that they axke you by spekying or by writyng, two thynges or three, or as manye as them lust. But that ever it stande in the fredom of your hie Regalie, to graunte whiche of thoo that you lust, and to werune the remanent."

To this the King replied 'The Kyng of his grace especial graunteth that fro hensforth no thyng be enacted to the Peticions of his Comune, that be contrarie of hir askyng wharby they shuld be bounde withoute their assent. Savyng alwey to our liege lord his royal prerogative to graunte and denye what him lust of their petitions and askynges aforesaide.'

In the reign of Henry VI. the Commons adopted the plan of putting their petition into the exact form they wished the statute to take. In 1429 they had petitioned that "hit lyke unto ye king by yadvys of the Lordys Spirituell and Temporell in yis present Parlement, yat graciously hit may be answered after the tenure and fourme yerof."

These petitions were known as '*petitiones formam actuum in se continentes.*' Not till after this did the House of Lords begin to originate bills. Thereafter the rule was that either House could originate a bill, but the Upper House could not originate a money bill, and the Lower House could not originate a bill affecting the Peerage.

From the beginning of the fifteenth century it appears to be settled that money grants are to be initiated in the House of Commons.

In the time of Charles I. the modern form appears, the act imposing a tax recites that the Commons have granted a tax, and then it is enacted by the King, by and with the advice and consent of the lords spiritual and temporal and commons in parliament assembled, and by the authority of the same, that the tax be imposed. After the Restoration it is established that the lords cannot amend a money bill, but must simply accept it or reject it. According to the resolutions of 1860, they cannot even reject a money bill.

Under the Parliament Act 1911, no money bill can be rejected by the House of Lords, or at least if it is not assented to by the House of Lords within a month of reaching that body, it automatically becomes law.

The legislative formula of a statute tells the whole tale of the increasing and finally predominant share of the Commons in legislation.

In the 14th century, the statute is made by the King with the assent of the prelates, earls, and barons, and at the request of the knights of the shire and commons. Afterwards they become "as well Assentirs as Peticioners," as we have seen, and the statute is passed by the advice and assent of lords and commons. For a while the form oscillates between the two positions, but becomes constant under the Tudors; the King enacts "with the assent of the lords spiritual and temporal and commons in parliament assembled, and by the authority of the said Parliament."

In the case of bills passed under the provisions of the Parliament Act 1911, there is a new formula: "Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled in accordance with the provisions of the Parliament Act 1911, and by authority of the same, as follows."

Money Bills.

Under Standing Order 66, no petition for any sum relating to the public service, nor any motion for a grant or charge upon the public revenue, whether payable out of the Consolidated Fund or out of moneys to be provided by Parliament, will be received or proceeded with unless recommended from the Crown. Compare the Preamble to a Dominion Appropriation Act in Canada, 'Whereas it appears by a message from his Excellency the Right Honourable Sir Albert Henry George, Earl Grey, Governor-General of Canada, and the estimates accompanying the said message, that the sum hereinafter mentioned is required to defray certain expenses of the public services of Canada,' and similar preambles in provincial statutes.

Two conventions of the Imperial Parliament are embodied in statute or observed in practice in Canada. The rule that money bills must originate in a recommendation from the representative of the Crown is based on statute, and not on standing order or convention; and in some form or other, the initiative and control of the Lower House over such bills is established. Moreover, all moneys can only be issued under a warrant signed by the Governor, and in signing such warrant, he must exercise his discretion in seeing that the grounds for his signature are good.

Dissolution—Prorogation—Adjournment.

A distinction must be drawn between a dissolution, a prorogation, and an adjournment. A dissolution brings the parliament to an end; a prorogation brings the session to an end, and terminates all pending business, and is brought about by the royal prerogative, the prorogation being to a fixed date, unless an acceleration or postponement of the same is directed by proclamation. An adjournment brings about a cessation of business for a fixed period at the discretion of the house, and does not terminate pending business.

Dissolution of Parliament used to take place on the demise of the Crown, but by the Representation of the People Act 1867, the duration (5 years under the Parliament Act 1911) of Parliament is independent of the Crown. By 37 Geo. III. c. 127, if a demise of the Crown occurs during a dissolution, the old Parliament is revived for six months. The legislatures

of Canada are not in any way affected by the demise of the Crown.

Powers of Canadian Parliament.

Parliament may,—

(1) Change the number for a quorum of the Senate (s. 35).

(2) Make a change in electoral districts (s. 40).

(4) Change the qualifications and disqualifications of persons to be elected or to sit or vote as members of the House of Commons, the voters at elections of such members, the oaths to be taken by voters, the returning officers, their powers and duties, the proceedings at elections, the periods during which elections may be continued, the trial of controverted elections, and proceedings incident thereto, the vacating of seats of members, and the execution of new writs in case of seats vacated otherwise than by dissolution (s. 41).

(5) Change the method of election of Speaker (s. 47).

(6) Make a decennial readjustment of representation in Parliament as between the different provinces (s. 51).

(7) Increase the number of members of the House of Commons, provided the proportionate representation prescribed by the B. N. A. Act is not thereby disturbed (s. 52).

Disqualifications (Imperial—Canadian).

Disqualifications for sitting in the Imperial House of Commons arise from: 1. Infancy. 2. Lunacy or idiocy. 3. Alienage. 4. The Possession of a peerage other than an Irish peerage, the holder not being one of the twenty-eight Irish peers. 5. Holy orders of clergy of the Established Church, ministers of the Church of Scotland or clergy of the Roman Catholic Church. 6. Possession of certain offices, returning officers, judges, all offices under the Crown created since 1705, and not specially exempted by statute, secretaries or under-secretaries of state, when more than four of either class are elected. These are entirely disqualified. Holders of old offices (created before 1705) must vacate their seats, but may be re-elected. 7. Pensioners holding their pensions at the pleasure of the Crown, other than civil service and diplomatic pensioners. 8. Government contractors. 9. Convicted felons. 10. Bankrupts. 11.

Persons who have been found guilty of corrupt practices at elections (partial).

Persons disqualified from sitting in the Dominion Parliament: 1. Members of the provincial legislatures. 2. Senators. 3. Officers under the Crown, with the exception of those specified in R. S. C. c. 1, 10. 4. Government contractors and shareholders in companies contracting for public works. 5. Lenders of money to government, and 6. Militiamen.

The rules as to Provincial Assemblies are similar.

Parliament—(Continued).

Privileges of the House of Commons.

The House of Commons always claim their privileges at the beginning of every Parliament, in particular they claim freedom from arrest, liberty of speech, that they may have access to His Majesty, and that their proceedings may receive the most favourable construction.

Freedom from Arrest.

This does not cover arrest for treason, felony, or breach of the peace, nor, indeed, for any indictable offence (Resolution of the Houses 1763), nor for contempt of court. By statute 10 Geo. III. c. 50, the old rule that action could not be commenced against a member or his servant (except 12 & 13 Wm. III. c. 3, during a dissolution, prorogation or adjournment for more than 14 days), was done away with, and process was allowed to issue against property, and the freedom from arrest limited to the person of members.

Members also have a right not to be subpœnaed to attend as a witness (a privilege which is always waived), and a right not to serve on juries. Confirmed by 53 & 34 Vict. c. 77, s. 9.

Freedom of Speech.

Though claimed for many centuries, the existence of this privilege was by no means firmly established, either under the Tudor or Stuart sovereigns, as witness the proceedings against Eliot, Holles and Valentine for speeches in Parliament in 1609.

It was distinctly recognized in the Bill of Rights (q.v.), but under George III. it was quite usual to remove from office held under the Crown, persons whose speeches were unpleasing

to the King, *e.g.*, the dismissal of General Conway in 1764 from his colonelcy of voting against the government on the question of general warrants.

The right to forbid publication of the proceedings of the House is a breach of this privilege, but the House at the present day does not consider a report of its proceedings in a newspaper or other publication to be a breach of its privileges, unless such report is manifestly inaccurate or untrue (*Wason* v. *Walter,* L. R. 4 Q. B. 73), but regards it as a breach of its privileges to publish a report from one of the parliamentary committees, before it is communicated to the House.

Now a fair and honest report does not lay the ground for an action of libel, except where there is an attempt to claim the privilege for a speech made in the House, and afterwards published by the maker himself.

The fact that defamatory statements have been published by the order of the House of Commons was held to be no defence in an action for libel (*Stockdale* v. *Hansard,* 9 A. & E. 1); but under a statute passed largely in consequence of this case, a certificate from the proper officer of the House acts as a stay of the action.

Strangers, though admitted by ticket, have no right to be present at the debates, and, since 1875, the Speaker can remove them upon his own initiative or they may be removed on the motion of any member who "spys strangers," without debate or amendment.

Right of Access.

The right of access to the King on the part of the House of Commons is a collective right, and exercised on the occasion of an address to the Crown being presented by the Speaker.

Sir Wm. Anson, vol. I. 167, notes as privileges of the House of Commons, which are not specifically claimed from the Crown:

(a) The right to provide for its proper Constitution.
  (1) The right to issue a writ, when a vacancy occurs.
  (2) The right to determine questions of disputed returns (in 1868 delegated to a judge).
  (3) The right to enforce disqualifications, *e.g.*, the disqualification of Arthur Lynch, who fought on the Boer side in the Boer war.

(4) The right to expel members who have conducted themselves so as to be unfit members of a legislative assembly.

(b) The right to the exclusive cognizance of matters arising within the House, *i.e.*, the Courts of law will not inquire into matters arising within the House (*e.g.*, the expulsion of a member by the Serjeant-at-Arms, as in the case of Mr. Bradlaugh), except in the case of a crime (see *Bradlaugh* v. *Gossett*, 12 Q. B. D. 280).

(c) The power to inflict punishment for breach of privilege by admonition, reprimand or commitment.

In considering the question as to how far the Courts are bound by the decisions of the House as to their privileges, Sir William Anson comes to the conclusion that the Courts will not be deterred from upholding private rights by the fact that questions of parliamentary privilege are involved in their maintenance; and that, except as regards the internal regulation of its proceedings by the House, courts of law will not hesitate to inquire into alleged privilege, as they would into local custom, and determine its extent and application.

The House of Lords has similar privileges, but there are a few differences; the right of access to the Sovereign is an individual right, as distinguished from a collective right; up to 1868 the Lords could vote by proxy, and a member of the House of Lords has the privilege of recording a protest against any proceeding of the House upon the journals of the House. It can exclude disqualified persons, but has no right to decide upon claims to old peerages, except where the question is referred to it by the King.

It is well settled that the extraordinary privileges of the House are part of the *lex et consuetudo Parliamenti*, which is peculiar to the English Parliament, and cannot be claimed by colonial legislatures, except, of course, when given to them by statute.

In *Landers* v. *Woodworth*, 2 C. S. C. R. 158, Mr. Woodworth had been adjudged guilty of contempt in refusing to apologize to the provincial secretary, whom he had accused of falsifying a record, without foundation for the charge as found by a committee of the House. Mr. Woodworth was forcibly

removed from the House and brought an action against the Speaker, etc., and recovered damages. The courts held that the assembly could not remove a member for contempt unless he was actually obstructing the business of the House.

Apart from statutory authority, Canadian legislatures have only such powers as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute (*Kielley* v. *Carson,* 4 Moo. P. C. 88). Protective and self-defensive powers only are necessary, and not punitive. (*Barton* v. *Taylor,* 11 A. C. 187).

Canadian legislatures can confer these powers upon themselves, but the Dominion Parliament cannot confer upon itself any privileges, immunities or powers exceeding those then held by the English House of Commons and the members thereof (B. N. A. Act, s. 18). It has been argued that the limitation placed upon the exercise of this power by the Parliament, also applies to provincial legislatures, but this argument can scarcely be sound.

And in the case of a province which has never been a colony within the meaning of the Colonial Laws Validity Act, the power can be exercised under sec. 92 (1) (see the Statutes of Alberta 1909, c. 2). Provincial legislatures may exclusively make laws relating to "the amendment from time to time, notwithstanding anything in this Act, of the constitution of the province, except as regards the office of Lieutenant-Governor" (B. N. A. Act, s. 92 (1)). It is clear that in the case of legislatures before the passage of the B. N. A. Act, there exists the power given by the Colonial Laws Validity Act and by sec. 92 (1). (See *Re Initiative and Referendum Act,* [1917] 1 W. W. R. 1012).

The Colonial Laws Validity Act 1865, s. 5, runs as follows: Every representative legislature shall, in respect to the colony under its jurisdiction, have and be deemed at all times to have had, full powers to make laws respecting the constitution, powers and procedure of such legislature. (See *Fielding* v. *Thomas,* 1896, A. C. 600), but whether this is true in the case of the Dominion or of post-federation provinces is perhaps doubtful.

Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island, Alberta and Saskatchewan all have laws dealing with these privileges. In British Columbia it is provided

by c. 47 of the Revised Statutes that the privileges of the House are not to exceed those of the British House of Commons.

None of the Acts, however, in fact seem to go as far as the powers of the English House of Commons, though they practically amount to the same thing. To give one small difference, they do not confer any right to impose a fine, a right which exists in the English House of Commons, though indeed it may be regarded as obsolete by reason of disuse.

Tendencies in Procedure.

Professor Redlich in his "Procedure of the House of Commons," vol. I. p. 206, points out the tendencies in procedure of the English House of Commons, (1) the strengthening of the disciplinary and administrative powers of the speaker, the continuous extension of the rights of the Government over the direction of all parliamentary action in the House, and lastly, the complete suppression of the private member, both as to his legislative initiative and as to the scope of action allowed to him by the rules.

It is, he remarks, a simple dictate of political logic that the metamorphosis in the attitude of Government towards Parliament should receive outward formulation in parliamentary procedure. He shows how the Government has reached a position of supreme authority in that (1) the greatest part of the time and energy of the House is securely assigned to the Government by the system of Government days, (2) the granting of supplies advocated by the Government is confined to certain time, and accompanied by certain facilities, and (3) the head of the Government, as leader of the House, has by custom become entrusted with complete disposal of the arrangements for settling the programme of parliamentary business, exercising thus a privilege which gives constant occasion for showing the confidence of the majority.

"In the British cabinet of to-day is concentrated all political power, all initiative in legislation and administration, and finally all public authority for carrying out the laws in kingdom and empire. In the sixteenth century and down to the middle of the seventeenth, this wealth of authority was united in the hands of the Crown and its Privy Council; in the eighteenth century and the first half of the nineteenth, Parliament was the dominant central organ from which proceeded the most powerful stimulus to action and all decisive acts of policy,

legislation and administration; the second half of the last century saw the gradual transfer from Crown and Parliament into the hands of the cabinet of one after another of the elements of authority and political power. This process—it must not be forgotten—took place side by side and in organic connection with the passing of political sovereignty into the hands of the House of Commons, supported, as it now was, by an electorate comprising all sections of the population" (Redlich, p. 207).

These remarks are equally applicable to Canadian legislatures. A strong contrast is offered by U. S. A. legislatures where the private member is active in initiating legislation.

Delegation of Powers by Provincial Parliament.

The Provincial Parliament can delegate its powers, *i.e.*, can confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect. (See *Hodge* v. *R.*, 9 A. C. 167.) It can be by no means said that the limits of this power of delegation are absolutely determined, *e.g.*, it would probably be *ultra vires* of a province to set up another body with the same powers by enacting that its regulations on the topics in sec. 92 should be law. It must be noted that one of the effects of this delegation to municipal bodies is the tendency to deprive the Crown of its veto.

Delegation by Dominion Parliament.

The Dominion Parliament can make its laws dependent on action by the Provincial Parliaments. (See *Reg.* v. *O'Rourke*, 32 U. C. C. P. 388, where it was held that the Dominion could delegate the Dominion power of legislating as to the qualification of jurors.)

Could the parliament of the commonwealth delegate the power to legislate regarding divorce to a committee of persons elected or summoned in some manner? The answer appears clearly to be in the negative, and it is easy to feel that this is correct, but the line might be hard to draw in any given case (see Keith, vol. I. 359).

It is not a sound argument that, because a change might be deliberately made by parliament in a constitution, therefore any ordinary act whatever might be passed, though in contravention of constitutional provisions as they stood (*Cooper* v. *Commissioner of Income Tax*, 4 C. L. R. 1304).

Closure and The Guillotine.

"Under one of the standing orders, a member rising in his place may claim to move 'that the question be now put,' and, unless it appears to the chair that the motion is an abuse of the rules of the house or an infringement of the rights of the minority, the preliminary question must be put forthwith, and, if it is carried, the original question is put forthwith and decided without amendment or debate. But a motion for the closure cannot be made unless the speaker or the chairman or deputy chairman of ways and means is in the chair, and is not carried unless it appears on a division that not less than 100 members voted in its support. The effect is to leave to the chair much discretion as to the time and circumstances in which closure should with propriety be granted.

"By recent amendments of standing orders, the machinery of closure has been extended to standing committees on bills, and, when a bill is being debated in a committee of the whole house, or at the report stage, the occupant of the chair may be clothed with powers for selecting the particular amendments to be discussed.

"But in recent years the machinery of the ordinary closure has been found inadequate for getting through the most important government bills of the session, and, at the instance of, but under protest from, each party in turn, more drastic measures have been adopted. They take the form of special orders of the house for the allocation of time on particular bills, are sometimes described as "closure by compartments," but are more popularly known as the guillotine. So much time is allotted for the discussion of a clause or a group of clauses, or a particular stage of a bill, and at the expiration of this time, the necessary question or series of questions is put, all remaining amendments, except government amendments, being excluded.

"Attempts are always made so to arrange the time as to afford opportunity for discussing all the more serious issues raised by the bill, but these attempts are usually defeated by the prolongation of the debate on minor points. No one defends these orders as satisfactory. Neither party, when in power, has found itself able to do without them." (Parliament, Sir Courtenay Ilbert, 136.)

General Principles Governing the Financial Action of Parliament.

Sir Courtenay Ilbert, in his book on Parliament, sums up the general principles governing the financial action of parliament in four rules:—

1. The Crown, that is to say, the King, acting through his ministers, who constitute the executive government, cannot raise money by taxation, borrowing or otherwise, or spend money, without the authority of parliament.

2. The power to grant money in parliament, a power which includes both the raising of money by tax or loan and the authorizing of expenditure, belongs exclusively to the house of commons. The house of lords assents to, and may, except as provided by the Parliament Act, reject, a grant of money, but cannot initiate or alter a grant.

3. Parliament, that is to say, the house of commons, cannot vote money for any purpose whatsoever except at the demand and upon the responsibility of ministers of the Crown.

4. Parliament, that is to say, the house of commons, cannot impose a tax, except upon the recommendation of the Crown. Accordingly any proposal for the levy of a new tax must come from the government. This rule only applies to general taxes, not to the taxes for local purposes which are known as rates.

Disallowance of Acts of Parliament.

Acts of Canada may be disallowed by the Crown in council within two years after the receipt of the Act by the Principal Secretary of State, the disallowance operating from the day on which it is signified by the Governor-General (s. 56). Provincial Acts may be disallowed by the Governor-General in council within one year after the receipt of the Act by him, the disallowance operating from the day on which it is signified by the Lieutenant-Governor (s. 90).

The veto of the Governor-General, as it would seem, must be exercised on the advice of his responsible ministers by the Governor-General in council, and not by the Governor-General as an imperial officer exercising a discretion in the interests of the home and colonial governments. It would follow from this view of the matter that the bill of a provincial legislature could not go beyond the Governor-General, or be submitted to

the Secretary of State for confirmation or disallowance. If the measure is inexpedient, the Governor-General must nevertheless affirm it, if his responsible ministers so advise him. If when so affirmed it is alleged to be beyond the powers of the provincial legislature, the matter may come before the Courts and so, ultimately, before the Judicial Committee of the Privy Council (see Anson, Vol. II. Pt. II. 71).

Keith does not take quite the same view as Anson, and deals with the question as follows:—

In 1875 the government of Canada held that the disallowance of provincial Acts was an act to be done by the Governor-General on ministerial advice, as all his other acts were done. The Imperial government seems never to have accepted this view, rather holding that a Governor-General was at liberty to follow the advice of ministers as a rule, whether or not he concurred in it as regards Acts which he deemed objectionable as illegal or unconstitutional, but in the case of Acts which he thought gravely unconstitutional, or which would have required reservation under the Royal Instructions in force for the Dominion, he should, even against the advice of his Ministers, refer home for guidance. Todd seems to agree with the view of the Canadian government. The question really hinges on the omission of the words "in council" after Governor-General in s. 90 of the B. N. A. Act, which gives to the latter the power of disallowance of provincial statutes. The Canadian government contended that the omission was for brevity and to avoid repetition. Under s. 56 disallowance by the Sovereign must be exercised by him in council, but the council, in that case, need not contain a minister at all, any three councillors being sufficient for the purpose. The constitutional practice, however, seems to be settled in favour of the Dominion contentions. This power was exercised for some time, as if it was almost an arbitrary power and upon quite inadequate legal grounds, but at the present time seems only to be exercised on legal and constitutional grounds, or on grounds of wide public and Imperial policy. Thus in 1909, Sir Allan Aylesworth clearly states that as Minister of Justice he "was not, as advising His Excellency in council, called upon to think at all of the injustice, of the outrageous character it might be, of the legislation, but that (his) one inquiry ought to be whether or not there was anything in the legislation itself which went

beyond the power of the Provincial Legislature to pass a law referring alone to property and civil rights within the province."

In the same sense is the memorial sent by the Government of Ontario to the Governor-General at the end of 1909, protesting against "any check upon the right of the Legislature to legislate with reference to subjects within its well-defined jurisdiction, although a technical right to disallow may exist."

A list of subjects in which Imperial control has been exercised even in late years: (1) matters affecting the internal affairs of the Dominion; (2) native affairs; (3) the immigration of coloured races; (4) treaty relations and foreign affairs; (5) trade and currency; (6) merchant shipping; (7) copyright; (8) divorce and status; (9) military and naval defence, and, according to instructions, matters affecting the prerogative.

Bills allowing appointments of colonial peerages or precedence, bills affecting prerogative of mercy or the Privy Council as an ultimate court of appeal, bills purporting to confer upon public bodies the title of chartered, and bills which are completely *ultra vires* are best disallowed.

CHAPTER XI.

The Privy Council and the Cabinet—Historical Sketch.

The King's Council initially was, in theory at any rate, an assembly of his tenants-in-chief. Under the Norman kings, this Council had certainly some share in legislation; the ordinances of the period are expressed to be made with the counsel and consent of the great. The Council was also the highest court of judicature for great cases and great men.

Within this assembly there developed a smaller body of administrators, including the justiciar, the chancellor, and the great officers of the household. This smaller body becomes well defined under Henry I., and subsequently threw off as offshoots the Exchequer and the Curia Regis proper or law court. The term Curia Regis is used to denote both this smaller permanent council and the larger assembly of tenants-in-chief.

After the formation of a real parliament in 1295 (the word parliament was applied to any consultative meeting of the estates of the realm, *i.e.*, of the clergy, barons and commons) the legislative work of the Great Council was continued, so it becomes necessary to distinguish between the work done by the barons as the King's Council and that done by Parliament.

"At the time of which we are speaking (1307)," says Maitland, "the parliament of the three estates was by no means the only organ of government; indeed, as we have seen, it was only just coming into being. Most of the great statutes of the reign were made in assemblies of the older type, assemblies in which the commons and the inferior clergy were not represented. Such assemblies of prelates and barons were held in later times, and got the name of Magna Concilia, which distinguished them from true Parliamenta."

The smaller body of administrators spoken of above continued to act as a permanent council of the King, and is often called Concilium Regis as opposed to the commune concilium regni, or assembly of the tenants-in-chief. This concilium first became distinct during the minority of Henry III., when it acted as a council of regency. It frequently exercised the power of legislation by ordinance. The House of Lords, as

successors to the Magnum Concilium, retained the right to correct the errors in law of all the lower courts, but gave up all claims to act as a court of first instance, save at the trial of a peer for treason or felony. They also tried persons who were impeached before them by the House of Commons. The House of Commons, after requesting in the reign of Henry IV., to be relieved of the judicial business of parliament, in 1621 condemned a certain Floyd to a fine and the pillory for expressing satisfaction at the triumph of the Catholic cause in Germany, but were in the end compelled to admit that they had no power of punishment, save where the privileges of their house were concerned. The Concilium Regis or smaller body (afterwards to grow into the Privy Council), attempted to assert the right of correcting the errors in law, but by the end of the 14th century it is definitely settled that they have no such jurisdiction. Notwithstanding many statutes of the reign of Edward III. forbidding the exercise of original jurisdiction by the council, the latter persisted in exercising such jurisdiction, nor was it oppressively exercised until the days of the Tudor sovereigns. At the beginning of the reign of Henry VII., it exercised original jurisdiction in the cases of crimes the penalty for which fell short of death, and especially over offences which consisted in an interference with the ordinary course of justice, such as insurrections or riots, and in the case of men who were too great for the power of the ordinary courts.

It also exercised a civil jurisdiction in cases where there was no remedy at law, or where the persons petitioned against were too powerful to be attacked in the ordinary courts. These petitions were, however, as a rule referred by the King's Council to the Chancellor, so much so that at the beginning of the fifteenth century the petitions begin to be addressed to the Chancellor himself, and by the time of Henry VII. the Court of Chancery has taken its place by the side of those of the King's Bench, Exchequer and Common Pleas as an established court of justice. Side by side with this jurisdiction of the Chancellor, the Council continued to act in poor men's causes (later becoming the Court of Requests, which came to an end during the troublous times of the civil war), and in cases where the delinquents were powerful or an ordinance was to be enforced, or in cases of offences against order, fraud, forgery, perjury, mutilation of documents or conspiracy.

This original jurisdiction of the Privy Council was finally taken away by the Long Parliament in 1640.

In the reign of Charles II., the Privy Council began to split up into committees for various purposes, *e.g.*, for Foreign Plantations, for Admiralty, for the Treasury, and soon there appears in this council, an inner council of privileged advisers of the King, who in time are termed the Cabinet. It is during the reign of William IV. that the Cabinet first becomes a recognized institution. By the time of Queen Anne there is found to be in existence a council the only duty of which is to give expression to the royal will, a committee of council which does the work now done by the different departmental heads, and a Cabinet which determines the policy of the nation.

The Cabinet.

The accident that George I. was entirely ignorant of English rendered his presence at a meeting of the Cabinet useless, and there begins to be Cabinet Government in the modern sense. At this time the Cabinet ceases to be a meeting of the Lords of the Privy Council and becomes a meeting of the leaders of the party in power, while the place of the king as president of the meetings is necessarily taken by another, who comes to be known as the Prime Minister, and the connection between the Privy Council and the Cabinet ceases, except in so far as it is practically an imperative rule that all members of the Cabinet must take the oath of secrecy as a privy councillor. The members of the Cabinet are heads of the executive departments, but the Cabinet is a deliberative body, whilst the Privy Council is an executive body carrying out the mandates of the Cabinet, when necessary, by Orders in Council. Sir Wm. Anson regards the Cabinet as a committee of heads of departments, united in holding the political opinions of the majority in the Commons, not severed from the House of Commons (*i.e.*, the members must ordinarily be members of one of the Houses of Parliament), *through* which, and not *with* which, the King acts, its members being jointly responsible for its actions. As a separate body, the collective Cabinet is unknown to law, it is summoned by the Prime Minister, a personage unknown to the law (except in so far as the title has gained recognition by the precedence given to him next after the Archbishop of York by Royal Warrant in 1905, and

by the fact that Disraeli signed the treaty of Berlin as "Prime Minister of England"). For a time, towards the end of the eighteenth century, the Cabinet showed signs of becoming an unwieldy body. The members were divided into "efficient" and "honorary." To the former only were the important state papers communicated. This was known as the circulation of papers. This external honorary Cabinet disappears about 1806. Collective responsibility, *i.e.*, responsibility to public opinion, liability to loss of office, for the action of any one of his members, was established about the same time. No record is kept of the doings or debates of the Cabinet, except such as is furnished by the Prime Minister to the King after the meetings, indeed the taking of a note is regarded with the greatest suspicion. The evolution of the Prime Minister has been slow. It cannot be said that there was any Prime Minister, in the modern sense of the word, until the time of Walpole, but the necessity of there being such an official was not recognized until the time of Pitt.

Of later days, Cabinets have tended to grow larger, but this has only led to the existence of an inside Cabinet, who control the policy of the government.

It must be noticed that the Cabinet and the Ministry are not identical, it is quite possible to be a Minister without being a member of the Cabinet at all.

Sir Wm. Anson notes that the King should only consult members of his Cabinet, and should neither act without their advice, nor refuse his support to any measure proposed by it; on the other hand, he should be given full information as to all acts of his government, and should be made acquainted with changes in administration prior to communication to outsiders.

"It is true," says Sir Wm. Anson, "to say that in the last 100 years the power which determines the existence and destruction of Cabinets, has shifted first from the Crown to the Commons, and then from the Commons to the electorate. But it is no longer true that the House of Commons is always a close reflection of the opinion of the country, or that it corresponds to changes of public opinion as they may occur during the existence of a Parliament." He concludes that the House of Commons is dependent rather on the Cabinet than the Cabinet on the Commons, a result in his opinion attribut-

able to the effect of the perfection of modern party organization, and of procedure rules, including the closure and guillotine.

For a complete working out of the idea that political power has been transferred in its entirety to the Cabinet, see Sidney Low's stimulating work on the Government of England.

To continue the story of the Privy Council. The growth of the Cabinet has caused it to be no longer a Council of the Crown. It still meets but only to make orders in Council, to issue Proclamations, or to attend formal acts of state. A Privy Councillor is appointed by the King, he takes the oath of allegiance and the oath of office, which pledges him to secrecy. He is removed from office by the simple expedient of the King striking his name off the list.

The Privy Council consists of (1) Members of the Cabinet. (2) Great officials, *e.g.*, the Lord Chancellor, the Lords of Appeal in Ordinary, the Archbishops of Canterbury and York and the Bishop of London. In 1897 all the premiers of the self-governing colonies were made Privy Councillors. (3) Persons who have won eminence in politics, etc., or the service of the Crown, and often take the dignity in preference to taking an hereditary peerage.

The office lasts for the life of the Sovereign and six months afterwards, but the new Sovereign invariably renews the appointment.

The Judicial Committee of the Privy Council is not one of the old committees. It is a statutory creation, having been established by 3 & 4 Wm. IV. It hears appeals from the Colonies, Channel Islands, the Isle of Man and India, from ecclesiastical courts, vice-admiralty courts abroad, consular courts and prize courts. The committee consists of persons who have held high judicial office at home or abroad, including colonial chief justices, who are privy councillors. Though the court hears cases just as an ordinary court would, yet theoretically, it only advises the King, and hence no dissenting opinions are ever given; and, unlike the House of Lords, it is not bound by the advice given on a former occasion. The proceedings are by petition, as seeking the King's grace. Besides the appellate, there exists in the sovereign in council an original jurisdiction on questions concerning boundaries between dependencies, the extent of charters and such like matters.

For a meeting of the Privy Council, three persons are sufficient. No person has a right to attend. The presence of the clerk of the Council is necessary, as his attestation is necessary to an order.

Orders in Council may consist of legislation for Crown colonies, newly settled countries and protectorates, or orders to carry out the details of a statute (statutory powers being given), orders for confirming or disallowing colonial statutes prior to being giving effect to, treaties, etc. The orders presented to the Council have of course been fully discussed by the Cabinet if of importance, or carefully prepared by the minister whose department they concern, and the actual business of the Council appears to be merely formal. The form of an Order in Council is given by Maitland as follows:

October 4, 1887.

At the Court of Balmoral the 15th day of September, 1887.

Present: The Queen's Most Excellent Majesty in Council. Whereas under certain statutes the Ecclesiastical Commissioners have prepared a scheme for making new parishes. And whereas the scheme has been approved of by H. M. in Council. Now therefore H. M. by and with the advice of her said Council is pleased to order and direct that the said scheme shall come into force on a certain date.

C. L. PEEL.

When it is desired to render the action of the Council widely public, a Royal Proclamation is issued. An example is here given.

A Proclamation.

We, being persuaded that the abstention from all unnecessary consumption of grain will furnish the surest and most effectual means of defeating the devices of Our enemies and thereby bringing the war to a speedy and successful termination;

And out of Our resolve to leave nothing undone which can contribute to these ends or to the welfare of Our people in these times of grave stress and anxiety;

Have thought fit by and with the advice of Our Privy Council to issue this Our Royal Proclamation, most earnestly

exhorting and charging all those of Our loving subjects, the men and women of Our realm who have the means to procure articles of food other than wheat and corn, as they tender their immediate interests and feel for the want of others, especially to practise the greatest economy and frugality in the use of every species of grain;

And We do for this purpose more particularly exhort and charge all heads of households to reduce the consumption of bread in their respective families by at least one-fourth of the quantity consumed in ordinary times;

To abstain from the use of flour in pastry, and moreover carefully to restrict, or wherever possible to abandon, the use thereof in all other articles than bread;

And We do also in like manner exhort and charge all persons who keep horses to abandon the practice of feeding the same on oats or other grain, unless they shall have received from Our Food Controller a licence to feed horses on oats or other grain, to be given only in cases where it is necessary to do so with a view to maintain the breed of horses in the national interest;

And We do hereby further charge and enjoin all ministers of religion in their respective churches and chapels within Our United Kingdom of Great Britain and Ireland to read or cause to be read this Our Proclamation on the Lord's Day for four successive weeks after the issue thereof.

Given at Our Court of Buckingham Palace this second day of May in the year of Our Lord 1917, and in the seventh year of Our Reign.

GOD SAVE THE KING.

In Canada, also, parliament has left much to the control of orders in council, *e.g.*, in health matters, food adulteration, penitentiaries, patents and copyrights, collection of statistics. By them the Governor-General disallows acts of the provincial legislatures. Their use is similarly extensive in the provinces.

In the case of the Dominion: Where an entirely new government is formed, all ministers who accept departmental offices must seek re-election, but where there is merely reconstruction of a government upon the death or resignation of a premier, re-election is unnecessary.

In the case of all the provinces, acceptance of office vacates a seat, but re-election is allowed, and it is not necessary if the minister is reappointed after resignation within a month, unless a new ministry has been formed in the interim.

In Canada there is a practice of having honorary ministers, or ministers without a portfolio, which is unknown to the English constitution, though the same end is attained by appointing a minister to a post, the duties of which are nominal, such as those of the Lord Privy Seal.

The head of a department in Canada has no assistance in Parliament corresponding to the Secretaries and Under-Secretaries of the English constitution.

In 1887 a Solicitor-General was appointed to assist the Minister of Justice. He may sit in parliament, but is not a member of the Cabinet. This appears to be the nearest approach in Canada to the departmental Secretaries and Under-Secretaries of the English constitution, who take so much work off the shoulders of their chief, though an unsuccessful attempt was made to establish similar offices in the department of trade and commerce in 1892.

Canadian ministries do not necessarily resign when defeated on a measure of importance. *Cf.*, Mr. Joly's ministry in Quebec, 1878-1879, and the ministry in British Columbia, 1899-1900.

In Canada neither the Governor-General nor the Lieutenant-Governors attend meetings of the Privy Council, except upon formal occasions, but all the orders in council are submitted to them for their signature.

Again, the Privy Council of the Dominion and the Executive Councils of Ontario, Quebec, Manitoba, Alberta and Saskatchewan exist by virtue of statutory authority, whereas the Privy Councils or Executive Councils of England, the Maritime Provinces and British Columbia are the outcome of the King's prerogative to seek advice.

Ministerial responsibility in Canada, as in England, rests entirely upon convention and practice, there being no provision that the members of the Cabinet or Privy Council or Executive Council, should be members of the Legislature. The rule, however, appears to be as in England, and it seems to be honoured in the breach in the same way,, *e.g.*, Mr. Gladstone was a Secretary of State, 1845-56, without a seat in the House of

Commons, and Mr. Templeman was a minister, 1908-1909, without a seat in the Canadian House of Commons. On the other hand, this action of Mr. Gladstone's was viewed with much disapproval, while the Lieutenant-Governor of British Columbia was dismissed by the Dominion Government in 1900 for entrusting the government for several months to a ministry of whom only one had a seat in the last Legislature.

Sir William Anson notices the immense importance of the business which may be transacted in the Council without discussion, and with no opportunity of question in Parliament, and instances orders in Council which redistributed duties in the Admiralty, and extended the powers of the High Commissioner in South Africa, an act that amounted to an assumption of sovereign rights over a vast territory. No doubt, he says, this is desirable in the interests of good government. The executive could not transact its business if every action depended on the approval of irresponsible politicians, and the collective House of Commons is well advised if it leaves to the Executive the responsibility in their inception for measures for the results of which a government must ultimately render an account to the country.

The Cabinet system in Canada bears a very close resemblance to that of England, but yet there are differences which it might be well to notice.

In England, the Cabinet is a small portion of the Council, and there may be ministers who are not Privy Councillors, or in the Cabinet.

In the Canadian provinces, the Executive Council is the Cabinet.

The Privy Council of the Dominion contains some persons who are not ministers or members of the Cabinet, but such members of the Council are not summoned to meetings of the Privy Council, except under unusual circumstances.

The Cabinet or group of departmental chiefs, on leaving office, remain members of the Executive Council, though they only attend its meetings for the transaction of formal Parliament business, or to advise on non-political questions.

Appeals to Privy Council.

By the Judicial Committee Act, 1844, a right is given to admit appeals from any Court in the Dominions whatever,

whether or not the Court is a Court of Error. The Canadian Act, R. S. C. 1906, c. 146, s. 1025, purports to extinguish all right of appeal in criminal cases. This latter Act is clearly *ultra vires,* but the point is of little moment as it is not likely that such an appeal will again be permitted.

The Privy Council has laid down a code of rules permitting appeals as of right; in such case leave to appeal is granted by the Colonial Court, but if there are no rules, or the rules do not cover the point, special leave must be asked, which is only granted where some important question of law is to be decided, or some important right is brought in question. No appeal, however, lies of right from the Supreme Court of Canada, and normally the Privy Council will not grant special leave in such cases to an appellant, though leave is more readily granted to a defeated respondent.

In general, appeals in the case of Canada will only be allowed where the case is of gravity, involving matters of public interest, or some important question of law as affecting property of considerable amount, or where the case is otherwise of some public importance, or of a very substantial character. Appeal will not be allowed where the judgment appealed from appears to be plainly right (see *R.* v. *Louw* [1904] A. C. 412). Rules as to appeals to the Privy Council are now established in Canada, and most of the provinces by Orders in Council.

His Majesty may refer to the Privy Council such matters as he may think fit, *e.g.,* the question of the boundary between Manitoba and Ontario in 1885, and the opinion reluctantly given as to prohibitory liquor laws in Canada.

It seems undeniable that in all cases, criminal as well as civil, arising in places from which an appeal would, and where either by the terms of a charter or *statute* the authority has not been parted with, it is the inherent prerogative right and on all proper occasions the duty of the Queen in Council to exercise an appellate jurisdiction with a view not only to ensure, as far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally (*Att'y-Gen. New South Wales* v. *Bertrand,* L. R. 1 P. C. 520).

A right of appeal to the King in Council as of right given by a Colonial Act, may be taken away by a subsequent Colonial Act; but apparently the Privy Council, or rather His Majesty in Council, may entertain appeals concerned with any subject-matter as a a matter of grace, save where the right of appeal has been taken away by an Imperial statute. Clement, at pp. 157 *et seq.*, throws some doubt upon this proposition (see *Cushing* v. *Dupuy*, 5 A. C. 409, and *Re Wi Matua's Will*, 1908, A. C. 448). There is, however, no right of appeal from a Court when it is exercising a function conferred upon it by statute, which would not otherwise have belonged to it as the general distributor of justice. The King in Council does not act as a court of appeal in criminal matters except where by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done (*In re Dulet*, 12 A. C. 459).

CHAPTER XII.

The Prerogative of the Crown.

Prerogative was defined by Blackstone 'as a special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of the common law in right of his royal dignity'; but the term "prerogative" is properly limited to the ancient customary powers of the Crown (Anson); it is the discretionary authority of the executive (Dicey). Statutory powers cannot strictly be classed as prerogative, the nature of the latter being only ascertainable by precedent, and its exercise limited by discretion allied to prerogative are the feudal rights of the Crown, which are 'mere incidents of prerogative.'

Prerogative has three sources, (1) the residue of the executive authority from the days when the King was a tribal chieftain; (2) the position of the King as the ultimate owner of land and lord of every man, *e.g.*, escheat, treasure trove, the custody of idiots and lunatics; (3) the attributes given to the Crown by legal theory.

(a) The attribute of perpetuity embodied in the maxim "The King never dies."

(b) The attribute of perfection of judgment embodied in the maxim, "The King can do no wrong," leading to the theory of ministerial responsibility, the existence of a petition of right, and the rule that in general the Crown cannot be attacked in tort.

(4) The King can pardon offences after indictment, but not before. (See The Bills of Rights).

Passing to concrete instances, of the exercise of the prerogative, we find—

A. The prerogatives affecting external relations:

(a) The power of making war and concluding peace.

(b) The power of sending and receiving ambassadors.

(c) The power of concluding treaties (but not where the rights of subjects under the ordinary law are affected, *e.g.*, copyright, or where the treaty involves the raising of money. Here the consent of parliament

is necessary. Theoretically the Crown can cede territory by a treaty, but this course is not pursued in important cessions, *e.g.*, that of Heligoland in 1890, but territory has often been ceded in India without parliamentary sanction).

(4) The power of granting passports, safe conducts, letters of marque and reprisals.
(Privateering was abolished by International Law under the Declaration of Paris, 1856.)

B. Personal Prerogatives:

(a) The King never dies.
(There is only a demise of the Crown, or transfer of royal authority to another.)

(b) The King can do no wrong, in the sense that he cannot be held responsible for a crime or tort.

(c) The King is not affected by Statutes of Limitation, except where expressly or by necessary intendment included.

(d) The King does not pay tolls or taxes.

(e) The King's person cannot be distrained nor his goods taken in execution.

C. Political Prerogatives:

1. All land is held of the Crown mediately or immediately.
2. Accretions to land, *e.g.*, by departure of the sea, so lands newly discovered by a subject, belong to him.
3. The King has a right of veto on Bills. (This has not been exercised since 1707, when Queen Anne refused assent to a Scotch Militia Bill.)
4. A limited power of issuing proclamations.
5. The power of conferring titles, granting precedence and armorial bearings.
6. The King is Supreme Commander of army and navy, but needs parliamentary authority for a standing army.
7. The coining of money, regulating weights and measures, establishing markets and fairs, and the erecting of beacons, lighthouses and sea marks. (These matters are more frequently dealt with by Parliament.)

8. The Crown as *parens patriæ* is *ex officio* guardian of infants, idiots and lunatics.

D. Judicial Prerogatives:

(1) The Crown can establish Courts to proceed according to the common law, but not a court of equity, and cannot issue commissions of martial law forbidden by the Petition of Right. The King is always present in court to do justice, therefore he cannot be nonsuited, though a *nolle prosequi* may be entered.

(2) The King cannot be sued in an ordinary action, though he may as an act of grace allow a petition of right, in cases of contract, or where he holds property belonging to a subject, but not in tort. Statutes sometimes expand the scope of a petition of right.

(3) The King can make use of prerogative process, thus he could issue an inquest office to determine the Crown's rights to lands or goods, used in cases of *bona vacantia* or escheat (statutes in places restrict this right) or a writ of escheat (a mode of execution) or a *scire facias* for the resumption of a grant.

Extensive Scope of Prerogative.

"She," says Bagehot, referring to Queen Victoria, "could disband the army (by law she cannot engage more than a certain number of men, but she is not obliged to engage any men); she could dismiss all the officers, from the general commanding in chief downwards; she could dismiss all the sailors too; she could sell off all our ships of war and all our naval stores; she could make a peace by the sacrifice of Cornwall and begin a war for the conquest of Brittany. She could make every citizen in the United Kingdom, male or female, a Peer; she could make every parish in the United Kingdom a 'university;' she could dismiss most of the civil servants; she could pardon all offenders." It is not, of course, suggested that the King in his personal capacity could do any of these things. When it is said that the King can do these things, it is meant that the Cabinet can by use of the prerogative do them. A practice, not altogether inconvenient, has arisen of speaking of the Crown, and the prerogative of the Crown, when it is desired to mark the difference between the kingly powers wielded by Cabinet Ministers, from

such powers as the King may possess in his own person. It is worth while noticing that in 1905, by a mere exercise of the prerogative, the form and administration of the English army was entirely recast.

The Prerogative in the Hands of the Governor.

The Crown must be taken to have vested in the Governor-General such prerogative power as is necessary for the conduct of the executive government of the Dominions, and in the Lieutenant-Governors such as is necessary for the purposes of provincial government. The prerogatives thus given are not conferred by law, but their exercise is regulated by law. These prerogatives too are exercisable only as far as they have been delegated by the Crown, and are not co-extensive with those of the Crown in the United Kingdom.

The distribution of executive authority between the Dominion and Provincial Executives in substance follows the distribution of legislative powers. Thus the prerogative power of the Crown to incorporate companies by charter has been held to reside in the Lieutenant-Governor of Ontario in so far as provincial objects required its exercise (see *Bonanza Creek Mining Co.* v. *Rex,* 10 W. W. R. 391). (It is said by Keith, vol. I., p. 118, that a Governor cannot grant royal charters of incorporation). The Dominion government has the prerogative of appointing officers of the Crown, including K.C.'s, for federal purposes, and each provincial government has a similar power of appointment for provincial purposes: *Lenoir* v. *Ritchie,* 1898, A. C. 247. It is to be observed that a Governor-General or a Lieutenant-Governor can legally do, not what the Crown can do, but what the Crown has entrusted to him (either expressly or impliedly), or what is vested in him by legislation).

Executive Powers of Governor-General and Lieutenant-Governor.

"The old view that the Lieutenant-Governor is a mere creature of the Governor-General, which was at the bottom of the disputes on the question of the power to appoint Queen's Counsel and to pardon offenders against provincial laws and so forth, may be regarded as entirely gone. By virtue of their commissions from the Governor-General and by virtue of the terms of the British North America Act creating the Governments of

the two re-separated provinces and continuing those of the Maritime Provinces, taken in conjunction with the terms on which British Columbia and Prince Edward Island joined the Union and the Acts creating the provinces of Manitoba, Alberta and Saskatchewan, there is no doubt at all about the Lieutenant-Governor being representative of the Queen and having full powers to perform all the acts for a province which a Governor may perform for a colony, as for instance, the appointment of officers, the dismissing of officers, the summoning, proroguing and dissolving of parliaments, and so forth. . . . The real position of the Lieutenant-Governor is that he is the wielder of the executive power of the province in its entirety, just as a colonial Governor wields the power of the colony." (Keith, p. 655). On the whole it would appear that the extent of the prerogative exercisable by a Lieutenant-Governor or the Governor-General must be sought for in their commissions or in the express words of the B. N. A. Act, always remembering that "executive power is in many situations which arise under the statutory constitution of Canada conferred by implication in the grant of legislative power, so that where such situations arise the two kinds of authority are correlative."

Powers not Delegated to Governor.

Powers which have not been delegated include the right to bestow honours, the right of investiture, the right of coinage (exercised however as a statutory power in Canada), the proclamation of war and peace, the making of treaties, the creation of courts (apart from statutory authorization), prerogatives relating to the conduct of foreign affairs, the right to fiat a petition of right. (Canadian legislation on this subject seems to leave the prerogative untouched). The rights that have not been either expressly or tacitly excluded by Canadian legislation and have not been delegated to Governors, are exercisable by the Crown (*The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*, [1892] A. C. 437).

Pardon.

The prerogative of mercy is always delegated to the Governor by some instrument, and, perhaps, without delegation it would not pass to him (see *A.-G. for Canada* v. *A.-G. for Ontario*, 23 C. C. R. 458).

The power of pardon can be barred by express words in a local Act, and in that case it seems that the Crown Imperial could not exercise the prerogative, though it might do so in cases where it had delegated the power. The power of pardon is not referred to in the letters patent, but it is set out in the instructions. Under these the Governor-General, when any crime or offence has been committed against the laws of the Dominion, "shall not pardon or reprieve any such offender without first receiving in capital cases the advice of the Privy Council for our said Dominion, and in other cases the advice of one, at least, of his ministers; and in any case in which such pardon or reprieve might directly affect the interests of our Empire or any country or place beyond the jurisdiction of the government of our said Dominion, our said Governor-General shall, before deciding as to either pardon or reprieve, take those interests specially into his personal consideration in conjunction with such advice as aforesaid."

The power of pardon is given by local statutes in all the provinces, and the power of altering the great seal is given by Imperial Statute in the case of the new provinces of Ontario and Quebec, and by local Acts in the old provinces which joined the Federation, and by the constitutions in the case of the provinces created after Federation.

Treaties.

Treaties made by the Crown are legally binding on Canada, whether or not the Dominion government consents thereto or not, but it must be taken that it is an essential part of the Constitution of the Empire that no treaty obligations should be imposed on a self-governing Dominion without its concurrence, but the mere making of a treaty cannot alter the ordinary rights of British subjects, so it becomes necessary for Canada, as it did in 1906, 1908, and 1911, with respect to Japanese and French Treaties, to pass the legislation which is necessary to give it full force (Keith, 1102).

Commercial treaties do not become applicable to self-governing colonies automatically, they are given a period within which to exercise an option of adherence. This rule does not hold in the case of general political treaties, though of course the Dominion is consulted with respect to any political treaty which directly affects its interests.

The Dominion government does not adhere to new treaties where the matter concerned is one which is within the exclusive legislative competence of the provincial legislature, though, probably, it would be legally justified in so doing as really the treaty is made by the Imperial government. The desirability of consultation with the provinces in such matters is, however, evident.

Sir Robert Borden, in 1909, insisted that treaties should be made subject to the ratification and approval of the Dominion Parliament. It can scarcely be said that it would materially change the actual situation, if the treaty-making power were given in completeness to the Dominion. Consuls in the Dominion are entitled to no diplomatic privileges, though they receive certain courtesies.

With regard to commercial treaties, it has been laid down by the Imperial government that negotiations between Her Majesty and the foreign sovereign must be conducted by Her Majesty's representative at the foreign court, who would keep Her Majesty's government informed of the progress of the discussion, and seek instruction from them as necessity arose. In order to give due help in the negotiations, Her Majesty's representative should, as a rule, be assisted by a delegate, appointed by the colonial government, either as a plenipotentiary or in a subordinate capacity as the circumstances might require. Canada seems never to have concluded a treaty with a foreign power direct; but in two cases provisional arrangements have been made of an informal character, expressly in contemplation of formal arrangements. Canada is, however, in the habit of carrying on informal negotiations with consular representatives of foreign powers.

In 1911 Sir Wilfrid Laurier "expressly declined to accept a resolution in the Colonial Conference asking that political treaties in general should be submitted to the Dominions before they were ratified by the Imperial government, giving as his reason that, if the Dominions demanded that they should be consulted in regard to such treaties, they would be bound to accept the consequences of the policies denoted by such treaties.

Letters Patent.

"The effect of these sections of The British North America Act (ss. 12, 64, 65) is that subject to certain express provi-

sions in that Act and to the supreme authority of the Sovereign, who delegates to the Governor-General and through his instrumentality to the Lieutenant-Governors the exercise of the prerogative on terms defined in their Commissions, the distribution under the new grant of executive authority in substance follows the new grant of legislative authority . . . Under both s. 12 and s. 65, the continuance of the powers thus delegated is made by implication to depend on the appropriate legislature not interfering.

"In the case of a company created by charter, the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an act not beyond its capacity, and is therefore not *ultra vires,* although such a violation may well give ground for proceedings by way of *scire facias* for the forfeiture of the charter. In the case of a company, the legal existence of which is wholly derived from the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of *ultra vires* applies."

"The words 'legislation in relation to the incorporation of companies with provincial objects,' do not preclude the province from *keping alive* the power of the executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. No do they appear to preclude the province from legislating so as to create, by or by virtue of a statute, a corporation with this general capacity. What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act, according with the distribution of legislative authority of powers and rights in respect of objects outside the province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted *ab extra.*" (Lord Haldane in *The Bonanza Creek Gold Mining Co.* v. *The King,* 10 W. W. R. 391).

CHAPTER XIII.

GOVERNORS.

The Governor-General is appointed by the Sovereign on the advice of the Secretary of State for the Colonies, and after consultation with the Government of the Dominion. (*Cf.* the successful objection on the part of the government of South Australia to the appointment of the Marquis of Normanby). A Lieutenant-Governor is appointed by the Governor-General in Council by Instrument under the Great Seal of Canada.

The office of Governor-General was constituted by letters patent under the Great Seal of the United Kingdom, and the appointment of the individual Governor-General is made by commission under the sign manual and signet, and is accompanied by royal instructions under the sign manual and signet dealing *inter alia* with the exercise of the power of pardon, the transmission of laws, and leave of absence from the Dominion.

In case of the absence or incapacity of the Governor, the administration of the government devolves upon the Chief Justice, or in his absence the senior judge. The Governor-General can by s. 14, and letters patent establishing the office, appoint a deputy or deputies by letters patent to exercise such of his powers, functions and authorities as he may deem expedient; and the appointment of such deputy or deputies is not to affect the exercise by the Governor-General himself of any power, authority or function, a position which, it has been said, "seems open to serious objection, as a Governor would seem to have power only within the limits of the territory of his colony, and the assent to a bill if given outside these limits might be deemed illegal. During the absence, illness or other inability of a Lieutenant-Governor, the Governor-General in Council may appoint an administrator to execute his office and functions. A Lieutenant-Governor is also authorised by letters patent to appoint deputies: s. 67.

With respect to exemptions of a Governor-General or Lieutenant-Governors from liability to answer in civil actions for acts of state in the courts both of Canada and the United Kingdom, it is thought the following summing up adequately represents the position: "The facts are clearly that, as the exe-

cutive head of the colony, the Governor has the responsibility for the maintenance of the government thrown upon him in especial measure, and that he will therefore be judged in his actions according to the duties which were imposed upon him. How far his actions will be held to have been reasonable will depend on circumstances, and will be weighed on the principles laid down in *R.* v. *Pinney,* 3 St. Tr. (N.S.) 11, and *Phillips* v. *Eyre,* 6 Q. B. 1, and the Governor will normally require the protection of the Act of Indemnity, which saved Eyre from serious difficulties": Keith, vol. I. p. 117.

A Lieutenant-Governor or the Governor-General may be sued in contract or tort with regard to his private acts: *Hill* v. *Bigge,* 3 Moo. P. C. 465, or for acts done in his official position (*Musgrave* v. *Pulido,* 5 A. C. 102), in Canada or in England (*Fabrigas* v. *Mostyn,* 20 St. Tr. 81). Under 11 & 12 Wm. III. c. 12, a Governor is made liable in England for oppression or crime beyond the seas, and for misdemeanours under 42 Geo. III. c. 85. Moreover, under the Offences against the Person Act, 1861, any British subject may be tried in England, if he is found there, for manslaughter or murder, and it is probable that even a Canadian Act of Indemnity would not save him from trial and possible condemnation (*cf.* the case of Governor Wall, 28 St. Tr., who nineteen years after the event was actually put to death for the murder of a soldier by excessive flogging). Apparently no mandamus lies against a Canadian Governor (*Church* v. *Middlemiss,* 21 L. C. J. 319, and *Molson* v. *Chapleau,* 6 L. R. 224).

It is clear that a Governor-General has a dual capacity as an Imperial officer, and as head of a dominion with responsible government. Mr. Edward Blake, Minister of Justice in 1875, propounded the theory that when acting in the latter capacity the Governor is "as of course to act on the advice of responsible ministers," but may act without "the advice not merely of a particular set of ministers, but of any ministers" in the rare instances in which, owing to the existence of substantial Imperial as distinguished from Canadian interests, it is considered that full freedom of action is not invested in the Canadian people. He is, however, something more than a mere formal officer in cases not involving his position as an Imperial officer, *i.e.,* he is not obliged to act on the advice of his ministers in the same sense as that in which the

King of the United Kingdom acts on the advice of his ministers, thus even within this sphere he receives instructions from the Crown, which he is bound to obey. (See Keith, vol. I., 171).

A Governor must not accept presents as Governor except with the permission in each case obtained of the Secretary of State. (Colonial Regulations, Nos. 46 and 47).

For the measure of the powers of a Governor-General, or of a Lieutenant-Governor, the words of his commission and of the British North America Act must be looked to. The prerogative powers of the Crown, unless parted with by express words, or by implication in the grant of legislative power, are not curtailed by the Act.

The provinces all include in their Revised Statutes an Act respecting the office of Lieutenant-Governor, creating him a corporation sole, and authorizing him to create deputies to sign licenses to incorporate companies, etc.

"Governor of Colony" in Imperial Acts.

A Lieutenant-Governor of a province is not a Governor of a colony within the meaning of the Imperial Acts, such as the Fugitive Offenders' Act, 1881; in such case the 'Governor' is the Governor-General.

Appendix to Chapter XIII.

Pulido v. *Musgrave.*

Sir Montague E. Smith delivered the judgment of their Lordships — To an action of trespass brought against the appellant, Sir Anthony Musgrave, in the Supreme Court of Jamaica, for seizing and detaining at Kingston, in Jamaica, a British schooner called the *Florence,* of which the plaintiff was charterer and which had, as alleged, put into the port of Kingston in distress and for repairs, the appellant pleaded the following plea:—

[His Lordship read the plea.]

The plaintiff demurred to this plea, and the present appeal is from the judgment of the Supreme Court allowing the demurrer, and ordering the appellant to answer further to the writ and declaration.

The plea is in form a dilatory plea, and does not profess to contain a defence in bar of the action. It was advisedly pleaded as a plea of privilege, with the object of raising the question of the immunity of the appellant as Governor from being impleaded and compelled to answer in the Courts of the Colony. That this was so is plain, not only from the form of the plea, but from an arrangement come to between the parties before the argument of the demurrer. In an interlocutory proceeding to set aside a judgment of *non pros.*, as irregularly obtained, an order was made by consent "that all pleas of the defendant, Sir Anthony Musgrave, except the plea of privilege by attorney, be struck out, together with replications and entry of judgment of *non pros.*, with liberty to the plaintiff to demur, it being arranged that the demurrer be set down for hearing at the present term, and if a judgment respondeat ouster, the defendant, Sir Anthony, have liberty to plead not guilty by statutes."

The decision of the Supreme Court was accordingly given upon the plea, as a plea of privilege, and altogether upon this aspect of it, the judgment being one of respondeat ouster.

Upon the hearing of the present appeal, the Attorney-General, on the part of the appellant, whilst not giving up the plea in the shape in which it was pleaded, insisted that if it disclosed a good defence in substance to the action, as he contended it did, its form and the arrangement of the parties might be disregarded, and a general judgment given for the defendant; and, though under protest from the respondent's counsel, the discussion at their Lordship's bar was allowed to take the wider scope which the Attorney-General's contention introduced into the case.

If the plea is to be regarded as a plea of privilege only, and as claiming immunity to the Governor from liability to be sued in the Courts of the Colony, their Lordships think it cannot, in that aspect of it, be sustained.

The *dictum* attributed to Lord Mansfield in *Mostyn* v. *Fabrigas*, that "the Governor of a colony is in the nature of a Viceroy, and therefore locally during his government, no civil or criminal action will lie against him, the reason is, because upon process he would be subject to imprisonment," was dissented from, and declared to be without legal foundation in the judgment of the Lords of the Judicial Committee delivered

by Lord Brougham in the case of *Hill* v. *Bigg*. In that appeal their Lordships were of opinion that the plea of the Lieutenant-Governor of the Island of Trinidad to an action brought against him in the Civil Court of the island, claiming that whilst Lieutenant-Governor he was not liable to be sued in that Court, could not be sustained. The action was for a private debt contracted by the defendant in England before he became Governor, but the principle affirmed by the judgment is that the Governor of a colony, under the commission usually issued by the Crown, cannot claim, as a personal privilege, exemption from being sued in the Courts of the colony. The claim to such exemption is thus met: "If it be said that the Governor of a colony is quasi Sovereign, the answer is that he does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his commission, and being only the officer to execute the specific powers with which that commission clothes him."

The defendant has sought to strengthen his claim of privilege by averring in his plea that the acts complained of were done by him *as Governor*, and *acts of State*. Their Lordships propose hereafter to consider the particular averments of this plea. It is enough here to say that it appears to them that if the Governor cannot claim exemption from being sued in the Courts of the colony in which he hold that office, as a personal privilege, simply from his being Governor, and is obliged to go further, his plea must then show by proper and sufficient averments that the acts complained of were acts of State policy within the limits of his commission, and were done by him as the servant of the Crown, so as to be, as they are sometimes shortly termed, acts of State. A plea, however, disclosing these facts would raise more than a question of personal exemption from being sued, and would afford an answer to the action, not only in the Courts of the colony, but in all Courts: and therefore it would seem to be a consequence of the decision in *Hill* v. *Bigg*, that the question of personal privilege cannot practically arise, being merged in the larger one; whether the facts pleaded show that the acts complained of were really such acts of state as are not cognizable by any Municipal Court. In the case of *The Nabob of the Carnatic* v. *The East India Company*, Lord Thurlow said that a plea pleaded in form to the jurisdiction of the Courts, but which denied the jurisdic-

tion of all Courts over the matter, was absurd; and that such a plea, if it meant anything, was a plea in bar.

In their Lordships' view, therefore, this plea, if it can be supported, must be sustained on the ground mainly relied upon by the Attorney-General, namely, that it discloses in substance a defence to the action.

Before adverting to the sufficiency of the averments in this plea, it will be convenient to refer to some decisions in which the position of Governors of colonies has been considered. In the leading case of *Mostyn* v. *Fabrigas,* the action was brought against Mr. Mostyn, the Governor of Minorca, for imprisoning the plaintiff, and removing him by force from that island. The Governor's special plea of justification alleged that he was invested with all the powers, civil and military, belonging to the government of the island, that the plaintiff was guilty of a riot, and was endeavouring to raise a mutiny among the inhabitants, in breach of the peace, and that, in order to preserve the peace and government of the island, he was forced to banish the plaintiff from it. It then averred that the acts complained of were necessary for this object, and were done without undue violence. Upon the trial, the Governor failed to prove this plea, and the plaintiff had a verdict. When the case came before the Court of Queen's Bench, upon a bill of exceptions to the ruling of the Judge, Lord Mansfield said that his great difficulty had been, after two arguments, to be able clearly to comprehend what the question was that was meant seriously to be argued. It seems, however, that the liability of the Governor to be sued, was raised, and very fully discussed, one ground of objection being that he could not be sued in England for an act done in a country beyond the seas, and upon this question Lord Mansfield declared that the action would, to use his own phrase, "most emphatically" lie against the Governor. His judgment proceeds to show, in a passage bearing materially on the point now under discussion, in what way a defence to such an action might be made. He says, "If he has acted right according to the authority with which he is invested, he may lay it before the Court by way of plea, and the Court will exercise their judgment whether it is a sufficient justification or not. In this case, if the justification had been proved, the Court might have considered it a suffici-

ent answer; and if the nature of the case would have allowed of it, it might have adjudged that the raising of a mutiny was a good ground for such a proceeding."

In the case of *Cameron* v. *Kyte,* which came before this Board on an appeal from the Colony of Berbice, the question was, whether the Government had authority to reduce a commission of five per cent. upon all sales in the Colony, granted to an officer called the Vendue Master by the Dutch West India Company before the capitulation of the Colony to the British Crown. It was urged that the Governor was the King's representative, exercising the general authority of the Crown, and, as such, had power to make the disputed reduction. It was, however, decided that the Governor did not hold the position or possess the authority sought to be attributed to him, and that the act in question was beyond his powers. In the judgment of this Committee, delivered by Baron Parke, it is said:—

"There being, therefore, no express authority from the Crown, the right to make such an order must, if it exist at all, be implied from the nature of the office of Governor. If a Governor had, by virtue of that appointment, the whole sovereignty of the Colony delegated to him as a Viceroy, and represented the King in the government of that Colony, there would be good reason to contend that an act of sovereignty done by him would be valid and obligatory upon the subject living within his government, provided the act would be valid if done by the Sovereign himself, though such act might not be in conformity with the instructions which the Governor had received for the regulation of his own conduct.

The breach of those instructions might well be contended on this supposition to be matter resting between the Sovereign and his deputy, rendering the latter liable to censure or punishment, but not affecting the validity of the act done. But if the Governor be an officer merely with a limited authority from the Crown, his assumption of an act of sovereign power, out of the limits of the authority so given to him, would be purely void, and the Courts of the Colony over which he presided could not give it any legal effect. We think the office of Governor is of the latter description, for no authority or *dictum* has been cited before us to show that a Governor can be considered as having delegation of the whole Royal power

in any colony, as between him and the subject, when it is not expressly given by his commission. And we are not aware that any commission to Colonial Governors conveys such an extensive authority."

Again, it is said: "All that we decide is that the simple Act of the Governor alone, unauthorised by his commission, and not proved to be expressly or impliedly authorised by any instructions, is not equivalent to such an act done by the Crown itself."

In the well-known case of the action brought by Mr. Phillips against Mr. Eyre, the former Governor of Jamaica, for acts done by him whilst he was Governor, in suppressing an insurrection in that colony, the question raised was, whether the Colonial Act of Indemnity was an answer to an action brought in England. That such an Act was thought to be necessary, and it was alone relied on as a defence to the action, raises a strong presumption that it had been thought that the action might, but for this Act, have been maintained. It is to be observed, however, that the facts of the rebellion, and of its suppression, were averred in the plea, by way of introduction to the Act of Indemnity, and Mr. Justice Willes, in delivering the judgment of the Exchequer Chamber, after saying that the Court had discussed the validity of the defence upon the only question argued by counsel, namely, the effect of the Colonial Act, adds—"but we are not to be understood as thereby intimating that the plea might not be sustained upon more general grounds, as showing that the acts complained of were incident to the enforcement of martial law." It is to be noticed that the nature of those acts, and the occasion upon which they were committed, were shown by distinct averments in the plea.

It is apparent from these authorities, that the Governor of a Colony (in ordinary cases) cannot be regarded as a Viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him. Let it be granted that, for acts of power done by a Governor under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown and is exercising its sovereign authority, the like protection cannot be extended to acts which are wholly beyond the authority con-

fided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of state. When questions of this kind arise, it must necessarily be within the province of Municipal Courts to determine the true character of the acts done by a Governor, though it may be that, when it is established that the particular act in question is really an act of state policy done under the authority of the Crown, the defence is complete, and the Courts can take no further cognizance of it. It is unnecessary, on this demurrer, to consider how far a Governor when acting within the limits of his authority, but mistakenly, is protected.

Two cases from Ireland were cited by the appellant's counsel, in which the Irish Courts stayed proceedings in actions brought against the Lord Lieutenant of Ireland. In these cases, the Lord Lieutenant appears to have been regarded as a Viceroy. In both, the facts were brought before the Court, and in both it appeared that the acts complained of were political acts done by the Lord Lieutenant in his official capacity, and were assumed to be within the limits of the authority delegated to him by the Crown. The Courts appear to have thought that under these circumstances no action would lie against the Lord Lieutenant in Ireland, and upon the facts brought to their notice it may well be that no action would have lain against him anywhere—*Tandy* v. *Earl of Westmoreland, Luby* v. *Lord Wodehouse.*

Several cases were cited during the argument of actions brought against the East India Company, and the Secretary of State for India, in which questions have arisen whether the acts of the Indian Government were or were not acts of Sovereignty or State, and so beyond the cognizance of the Municipal Courts. The East India Company, though exercising (under limits) delegated sovereign power, was subject to the jurisdiction of the Municipal Courts in India, and it will be found from the decisions that many acts of the Indian Government, though in some sense they may be designated "acts of State," have been declared to be within the cognizance of those Courts. Thus, in the *Rajah of Tanjore's Case,* the question to be decided was thus stated by Lord Kingsdown, in giving the judgment of the Committee: "What is the real character of the act done in this case? Was it a seizure by arbitrary

power on behalf of the Crown of Great Britain of the dominion and property of a neighbouring State, an act not affecting to justify itself on grounds of municipal law; or was it in whole or in part a possession taken by the Crown under colour of legal title of the property of the late Rajah, in trust for those who by law might be entitled to it? If it were the latter, the defence set up, of course, has no foundation."

This Committee, in deciding the questions thus raised, held that the seizure was of the former character, and, therefore, not cognizable by a Municipal Court. The answer of the East India Company in this case did not rest on the simple assertion that the seizure was an act of State, but set out the circumstances under which the Rajah's property was taken. After referring to the treaties made with the Rajah, it averred that in entering into these treaties, and in treating the sovereignty and territories of Tanjore as lapsed to the East India Company in trust for the Crown, the company acted in their public political capacity, and in exercise of the powers (referring at length to them) committed to them in trust for the Crown of Great Britain, and that all the acts set forth in the answer "were acts and matters of State."

In the case of *Forester and others* v. *The Secretary of State for India,* in which the judgment of this Committee was delivered on the 11th of May, 1872, a defence of the same nature as that in the last-mentioned case was set up; but the decision there was, on this point, against the Secretary of State. In this suit also the answer set out the facts which were relied on to show that the action of the Government complained of was a political act of State.

As far as their Lordships are aware, it will be found that in all the suits brought against the Government of India, whether in this country or in India, the pleas and answers of the Government have shown, with more or less particularity, the nature and character of the acts complained of, and the grounds on which, as being political acts of the Sovereign power, they were not cognizable by the Courts. (See *The Nabob of the Carnatic* v. *The East India Company, The Ex-Rajah of Coorg* v. *The East India Company, Rajah Salig Ram* v. *The Secretary of State for India,* in which judgment was given by this Committee on the 22nd of August, 1872.)

None of these cases help the present plea. On the contrary, it appears from them not only that the facts were laid before the Courts, but that the Courts entertained jurisdiction to enquire into the nature of the acts complained of, and it was only when it was established that they bore the character of political acts of State, that it was decided they could not take further cognizance of them. It is to be observed that the sovereign authority conferred upon the East India Company appears in Acts of Parliament, and, therefore, without being pleaded, the Courts would have judicial notice of it. Coming to the present plea, we find that, after stating that the defendant was Captain General and Governor-in-Chief of the Island of Jamaica, the only averments in it are, that the acts complained of were done by him as Governor of the Island, and in the exercise of his reasonable discretion as such, and as acts of State. There is no attempt to show the occasion on which the seizure of the plaintiff's ship was made, nor the grounds on which that seizure, which is not in itself of the nature of an act of State, became and was such an act. The plea does not aver, even generally, that the seizure was an act which the defendant was empowered to do as Governor, nor even that it was an act of State. It would have been contended at the trial, if issue had been taken, that it would satisfy the averments of this plea to prove that the defendant assumed to make the seizure as Governor, and assumed to do it as an act of State, without showing that the act itself was an act of State properly so called, and was within the limits of his authority. It was said that the plea should be construed as requiring, by implication, proof of these matters; but having regard to its nature and form as a plea of privilege, this cannot properly be held to be its meaning. Their lordships cannot but think it was designedly pleaded in its present shape. It was a preliminary plea intended to raise the question whether the Governor, if acting *de facto* as such, and doing an act that he assumed and deemed to be an act of State, could be called on to show in the Courts of the Colony that the seizure complained of was really an act of State, of the nature and class of those which, as Governor acting on behalf of the Crown, he had authority to do. The object of the plea plainly was to stop the Court from entering upon such an enquiry; but upon the construction now sought to be given to it, this object would, from the first, have been frustrated, if issue had

been taken, for the Court must then have gone into the very enquiry which it was the manifest purpose of the plea to avert. It appears to their Lordships that the plaintiff could not have safely taken issue on it. He would have been met at the trial by the objection that it was a plea of privilege, pleaded as a preliminary plea to the jurisdiction, and neither was, nor was intended to be, an answer to the action.

It was contended that, under "The Supreme Court Procedure Law, 1872," of the Colony, which provides that defects in form shall be disregarded, and that, on demurrer, the Court shall give judgment according to the very right of the cause, the judgment should now be given for the appellant; but their Lordships think, for the reasons above given, that upon this ambiguous and defective plea a proper and final judgment on the right of the cause, cannot be pronounced.

In the result, their Lordships must humbly advise Her Majesty to affirm the judgment of the Court below, and with costs.

CHAPTER XIV.

The Commission of the Governor—Documents and Annotations.

1. *Commission of Governor Cornwallis, 1749.*

George the Second, by the Grace of God of Great Britain, France, and Ireland, King, Defender of Faith, etc. To our trusty and well beloved, the Honourable Edward Cornwallis, Esquire, Greeting. Whereas we did by our letters patent under our Great Seal of Great Britain, bearing date at Westminster the eleventh day of September in the second year of our reign, constitute and appoint Richard Philipps, Esquire, our Captain General, and Governor in Chief, in and over our Province of Nova Scotia or Acadie, in America, with all the rights, members and appurtenances whatsoever thereunto belonging, for and during our will and pleasure; as by the said recited letters patent, relation being thereunto had, may more fully and at large appear.

Now know you that we have revoked and determined, and by these presents do revoke and determine the said recited letters patent, and every clause, article and thing therein contained; and further know you that we reposing special trust and confidence in the prudence, courage, and loyalty of you, the said Edward Cornwallis, of our special grace, certain knowledge and mere motion, have thought fit to constitute and appoint you, the said Edward Cornwallis, to be our Captain General and Governor in Chief in and over our Province of Nova Scotia or Acadie in America, with all the rights, members, and appurtenances whatsoever thereunto belonging, and we do hereby require and command you to do and execute all things in due manner that shall belong unto your said command and the trust we have reposed in you according to the several powers and authorities granted or appointed you by this present Commission and the instructions herewith given you; or by such further powers, instructions and authorities as shall at any time hereafter be granted or appointed you under our signet and sign manual, or by our order in our Privy Council, and according to such reasonable laws and statutes as hereafter shall be made or agreed upon by you with the advice

and consent of our Council and the Assembly of our said Province, under your government hereafter to be appointed in such manner and form as is hereafter expressed.

And for the better administration of justice, and the management of the public affairs of our said Province, we hereby give and grant unto you, the said Edward Cornwallis, full power and authority to chuse, nominate and appoint such fitting and discreet persons as you shall either find there or carry along with you, not exceeding the number of twelve, to be of our Council in our said Province. As also to nominate and appoint by warrant under your hand and seal all such other officers and ministers as you shall judge proper and necessary for our service and the good of the people whom we shall settle in our said Province until our further will and pleasure shall be known.

And our will and pleasure is, that you the said Edward Cornwallis (after the publication of these our letters patent), do take the oaths appointed to be taken by an Act passed in the first year of his late Majesty's, our Royal father's reign, entitled "An Act for the further security of His Majesty's Person and Government and the succession of the Crown in the Heirs of the late Princess Sophia, being Protestants, and for extinguishing the hopes of the pretended Prince of Wales and his open and secret abettors." As also that you make and subscribe the Declaration mentioned in an Act of Parliament made in the twenty-fifth year of the reign of King Charles the Second, entitled "An Act for preventing danger which may happen from Popish Recusants." And likewise that you take the usual oath for the due execution of the office and trust of our Captain General and Governor in Chief of our said Province, for the due and impartial administration of justice; and further that you take the oath required to be taken by Governors of Plantations to do their utmost that the several laws relating to Trade and the Plantations be observed. All which said oaths and declaration our Council in our said Province, or any five of the members thereof, have hereby full power and authority and are required to tender and administer unto you and in your absence to our Lieutenant-Governor, if there be any upon the place, all which being duly performed you shall administer unto each of the members of our said Council, as also to our Lieutenant-Governor, if there be any such upon the place, the said oaths mentioned in the said Act entitled

"An Act for the further security of His Majesty's Person and Government and the succession of the Crown in the heirs of the late Princess Sophia, being Protestants, and for extinguishing the hopes of the pretended Prince of Wales and his open and secret abettors;" as also to cause them to make and subscribe the aforementioned declaration and to administer to them the oath for the due execution of their places and trusts.

And we hereby give and grant unto you full power and authority to suspend any of the members of our said Council to be appointed by you as aforesaid from sitting, voting, and assisting therein if you shall find just cause for so doing.

And if it shall at any time happen that by the death, departure out of our said Province, suspension of any of our said Councillors, or otherwise, there shall be a vacancy in our said Council (any five whereof we do hereby appoint to be a quorum), our will and pleasure is that you signify the same unto us by the first opportunity that we may under our signet and sign manual constitute and appoint others in their stead.

But that our affairs at that distance may not suffer for want of a due number of Councillors, if even it shall happen that there shall be less than nine of them residing in our said Province, we hereby give and grant unto you the said Edward Cornwallis full power and authority to chuse as many persons out of the principal freeholders inhabitants thereof as will make up the full number of our said Council to be nine and no more; which persons so chosen and appointed by you shall be to all intents and purposes Councillors in our said Province until either they shall be confirmed by us, or that by the nomination of others by us under our sign manual or signet our said Council shall have nine or more persons in it.

And we do hereby give and grant unto you full power and authority, with the advice and consent of our said Council, from time to time as need shall require, to summon and call General Assemblys of the Freeholders and Planters within your Government, according to the usage of the rest of our Colonies and Plantations in America.

And our will and pleasure is that the persons thereupon duly elected by the major part of the Freeholders of the respective counties and places and so returned shall before their sitting take the Oaths mentioned in the Act entitled "An Act for the further security of his Majesty's Person and Govern-

ment and the succession of the Crown in the Heirs of the late princess Sophia being Protestants, and for extinguishing the hopes of the pretended Prince of Wales and his open and secret abettors," as also make and subscribe the aforementioned declaration (which Oaths and Declaration you shall commissionate fit persons under our Seal of Nova Scotia to tender and administer unto them), and until the same shall be so taken and subscribed no person shall be capable of sitting tho' elected, and we do hereby declare that the persons so elected and qualified shall be called and deemed the General Assembly of that our Province of Nova Scotia.

And that you the said Edward Cornwallis with the advice and consent of our said Council and Assembly, or the major part of them respectively, shall have full power and authority to make, constitute, and ordain Laws, Statutes and Ordinances for the publick peace, welfare and good government of our said province and of the people and inhabitants thereof and such others as shall resort thereto, and for the benefit of us, our heirs and successors, which said Laws, Statutes, and Ordinances are not to be repugnant, but as near as may be agreeable, to the Laws and Statutes of this our Kingdom of Great Britain.

Provided that all such Laws, Statutes and Ordinances, of what nature or duration so ever, be within three months or sooner after the making thereof transmitted to us under our Seal of Nova Scotia for our approbation or disallowance thereof, as also duplicates by the next conveyance.

And in case any or all of the said Laws, Statutes and Ordinances not before confirmed by us shall at any time be disallowed, and not approved and so signified by us, our Heirs or Successors under our or their sign manual and signet, or by order of our or their privy Council unto you the said Edward Cornwallis, or to the Commander in Chief of our said Province for the time being, then such and so many of the said Laws, Statutes and Ordinances as shall be so disallowed and not approved shall from thenceforth cease, determine, and become utterly void and of none effect, anything to the contrary thereof notwithstanding.

And to the end that nothing may be passed or done by our said Council or Assembly to the prejudice of us our Heirs and Successors, we will and ordain that you the said Edward

Cornwallis shall have and enjoy a negative voice in the making and passing of all Laws, Statutes and Ordinances as aforesaid.

And you shall and may likewise from time to time, as you shall judge it necessary, adjourn, prorogue and dissolve all General Assemblies as aforesaid.

And our further will and pleasure is that you shall and may keep and use the Publick Seal of our Province of Nova Scotia for sealing all things whatsoever that pass the Great Seal of our said Province under your Government.

And we do further give and grant unto you the said Edward Cornwallis full power and authority from time to time and at any time hereafter, by yourself or by any other to be authorized by you in that behalf, to administer and give the oaths mentioned in the aforesaid Act to all and every such person or persons as you shall think fit, who shall at any time or times pass into our said Province or shall be residing or abiding there.

And we do by these presents give and grant unto you the said Edward Cornwallis full power and authority, with advice and consent of our said Council, to erect, constitute, and establish such and so many Courts of Judicature and Publick Justice within our said Province and Dominions as you and they shall think fit and necessary for the hearing and determining all and for awarding of Execution thereupon with all reasonable and necessary powers, authorities, fees and privileges belonging thereunto, as also to appoint and commissionate fit persons in the several parts of your Government to administer the oaths mentioned in the aforesaid Act, entitled "An Act for the further security of His Majesty's Person and Government and the Succession of the Crown in the Heirs of the late Princess Sophia being Protestants, and for extinguishing the hopes of the pretended Prince of Wales and his open and secret abettors;" as also to administer the aforesaid declaration unto such persons belonging to the said Courts as shall be obliged to take the same.

And we do hereby authorize and impower you to constitute and appoint Judges, and in cases requisite Commissioners of Oyer and Terminer, Justices of the Peace, and other necessary officers and ministers in our said Province for the better administration of justice and putting the laws in execution, and to administer or cause to be administered unto them such oath

or oaths as are usually given for the due execution and performance of offices and places and for the clearing of truth in judicial causes.

And we do hereby give and grant unto you full power and authority, where you shall see cause, or shall judge any offender or offender in criminal matters or for any fines or forfeitures due unto us objects of our mercy, to pardon all such offenders and to remit all such offences, fines, and forfeitures, treason and wilfull murder only excepted; in which cases you shall likewise have power upon extraordinary occasions to grant reprieves to the offenders until and to the intent our Royal pleasure may be known therein.

We do by these presents authorise and empower you to collate any person or persons to any churches, chapels, or other ecclesiastical benefices within our said Province as often as any of them shall happen to be void.

And we do hereby give and grant unto you the said Edward Cornwallis, by yourself or by your captains and commanders by you to be authorised, full power and authority to levy, arm, muster, command and employ all persons whatsoever residing within our said Province, and as occasion shall serve, to march from one place to another or to embark them for the resisting and withstanding of all enemies, pirates and rebels, both at land and sea, and to transport such forces to any of our plantations in America, if necessity shall require, for the defence of the same against the invasion or attempts of any of our enemies; and such enemies, pirates and rebels, if there shall be occasion to pursue and prosecute in or out of the limits of our said Province and plantations or any of them and (if it shall so please God) to vanquish, apprehend and take them, and being taken, according to law to put to death or keep and preserve them alive at your discretion, and to execute Martial Law in time of invasion or other times when by law it may be executed, and to do and execute all and every other thing or things which to our Captain Generals and Governor in Chief, doth or ought of right belong.

And we do hereby give and grant unto you full power and authority by and with the advice and consent of our said Council of Nova Scotia, to erect, raise and build in our said Province such and so many forts and platforms, castles, citys, boroughs, towns and fortifications as you by the advice aforesaid shall

judge necessary, and the same or any of them to fortify and furnish with ordinance, ammunition and all sorts of arms fit and necessary for the security and defence of our said Province, and by the advice aforesaid the same again, or any of them, to demolish or dismantle as may be most convenient.

And for as much as divers mutinies and disorders may happen by persons shipped and employed at sea during the time of war, and to the end that such as shall be shipped and employed at sea during the time of war may be better governed and ordered, we hereby give and grant unto you, the said Edward Cornwallis, full power and authority to constitute and appoint captains, lieutenants, masters of ships, and other commanders and officers, and to grant to such captains, lieutenants, masters of ships, and other commanders and officers commissions in time of war to execute the law martial according to the directions of such laws as are now in force or shall hereafter be passed in Great Britain for that purpose, and to use such proceedings, authorities, punishments and executions upon any offender or offenders who shall be mutinous, seditious, disorderly or any way unruly either at sea or during the time of their abode or residence in any of the ports, harbours, or bays of our said Province, as the cause shall be found to require according to the martial law and the said directions during the time of war as aforesaid.

Provided that nothing herein contained shall be construed to the enabling you or any by your authority to hold, plea or have any jurisdiction of any offence, cause, matter or thing committed or done upon the high sea, or within any of the havens, rivers or creeks of our said Province under your government by any captain, commander, lieutenant, master, officer, seaman, soldier or person whatsoever, who shall be in our actual service or pay in or on board any of our ships of war or other vessels, acting by immediate Commission or Warrant from our Commissioners for executing the office of our High Admiral of Great Britain for the time being, under the Seal of our Admiralty, but that such captain, commander, lieutenant, master, officer, seaman, soldier, or other person so offending shall be left to be proceeded against and tryed as their offences shall require, either by Commission under our Great Seal of Great Britain as the Statute of the 28th of Henry the Eighth directs, or by Commission from our said Commissioners for executing the office of our High Admiral, or from our High

Admiral of Great Britain for the time being, according to the afore-mentioned Act for the establishing articles and orders for the regulating and better government of His Majesty's Navies, Ships of War and Forces by Sea, and not otherwise.

Provided nevertheless that all disorders and misdmeanours committed on shore by any captain, commander, lieutenant, master, officer, seaman, soldier or other person whatsoever belonging to any of our ships of war or other vessels acting by immediate Commission or Warrant from our said Commissioners for executing the office of High Admiral, or from our High Admiral of Great Britain, for the time being under the Seal of our Admiralty, may be tried and punished according to the laws of the place where any such disorders, offences, and misdemeanors shall be committed on shore, notwithstanding such offender be in our actual service, and borne in our pay, on board any such our ships of war or other vessels acting by immediate Commission or Warrant from our said Commissioners for executing the office of High Admiral, or our High Admiral of Great Britain for the time being as aforesaid, so as he shall not receive any protection for the avoiding of justice for such offences committed on shore from any pretence of his being employed in our service at sea.

And our further will and pleasure is that all publick money raised, or which shall be raised by any Act hereafter to be made within our said Province be issued out by Warrant from you by and with the advice and consent of the Council and disposed of by you for the support of the Government, and not otherwise.

And we do likewise give and grant unto you full power and authority, by and with the advice and consent of our said Council, to settle and agree with the Inhabitants of our Province for such lands, tenements, and hereditaments as now are or hereafter shall be in our power to dispose of, and them to grant to any person or persons upon such terms and under such moderate quit rents, services, and acknowledgments to be thereupon reserved unto us as you by and with the advice aforesaid shall think fit. When said grants are to pass and be sealed by our seal of Nova Scotia, and being entered upon record by such officer or officers as shall be appointed thereunto shall be good and effectual in law against us, our heirs and successors.

And we do hereby give you the said Edward Cornwallis full power to order and appoint fairs, marts and markets, as also such and so many ports, harbours, bays, havens and other places for convenience and security of shipping and for the better loading and unloading of goods and merchandizes, as by you with the advice and consent of the said Council shall be thought fit and necessary.

And we do hereby require and command all officers and ministers, civil and military, and all other Inhabitants of our said Province, to be obedient, aiding and assisting unto you the said Edward Cornwallis in the execution of this our commission and of the powers and authorities herein contained, and in case of your death or absence out of our said Province to be obedient, aiding and assisting unto such person as shall be appointed by us to be our Lieutenant-Governor or Commander in Chief of our said Province; to whom we do therefore by these presents give and grant all and singular the powers and authoritys herein granted, to be by him executed and enjoyed during our pleasure, or until your arrival within our said Province.

And if upon your death or absence out of our said Province there be no person upon the place commissionated or appointed by us to be our Lieutenant-Governor or Commander in Chief of the said Province, our will and pleasure is that the Eldest Councillor, who shall be at the time of your death or absence residing within our said Province, shall take upon him the administration of the government and execute our said Commission and Instructions and the several powers and authorities therein contained in the same manner and to all intent and purposes as either our Governor or Commander in Chief should or ought to do in case of your absence until your return, or in all cases until our further pleasure be known herein.

And we do hereby declare, ordain and appoint that you the said Edward Cornwallis, shall and may hold, execute and enjoy the office and place of our Captain General and Governor in Chief in and over our said Province of Nova Scotia, with all its rights, members and appurtenances whatsoever, together with all and singular the powers and authorities hereby granted unto you for and during our will and pleasure.

In witness whereof we have caused these our letters to be made patent. Witness ourself at Westminster the sixth day of May in the twenty-second year of our reign.

By writ of Privy Council.

[L.S.] (Signed) YORKE & YORKE.

2. *Commission and Instructions of Viscount Monck, 1867.*

Draft of a Commission to be passed under the Great Seal of the United Kingdom, appointing Viscount Monck to be Governor-General of Canada, on and after the first day of July, 1867.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to our Right Trusty and Well-Beloved Cousin, Charles Stanley, Viscount Monck,—Greeting:

1. Whereas We did, by divers Letters Patent, under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date severally at Westminster the second day of November, one thousand eight hundred and sixty-one, in the Twenty-fifth year of Our Reign, constitute and appoint you, Our Right Trusty and Well-beloved Cousin, Charles Stanley, Viscount Monck, to be, during Our pleasure, Our Captain, General and Governor in Chief in and over Our Province of Canada, and in and over the Province of Nova Scotia and its Dependencies, and in and over the Province of New Brunswick, and also Governor-General of all Our Provinces in North America and of the Island of Prince Edward, as by the several recited Letters Patent, relation being thereunto had, may more fully and at large appear:

And whereas by an Act of Parliament passed in the Thirtieth year of Our Reign, intituled, "The British North America Act, 1867," it is, amongst other things, enacted that it shall be lawful for Us, by and with the advice of Our Privy Council, to declare, by Proclamation, that on and after a day therein appointed, not being more than Six Months after the passing of the said Act, the Provinces of Canada, Nova Scotia and New Brunswick, shall form and be One Dominion, under the name of Canada; and on and after that day those three Provinces shall form and be One Dominion under that name, accordingly, and that Canada shall be divided into Four Provinces, named Ontario, Quebec, Nova Scotia and New Brunswick:

And whereas we did, on the twenty-second day of May, one thousand eight hundred and sixty-seven, by and with the advice of Our Privy Council, declare by Proclamation that, on and after the first day of July, one thousand eight hundred and sixty-seven, being within six months after the passing of the

said Act, the Provinces of Canada, Nova Scotia, and New Brunswick, should form and be one Dominion, under the name of Canada:

Now know You, that We do by these Presents declare Our pleasure to be, that the said recited Letters Patent, and every clause, article and thing therein contained, shall be and they are hereby declared to be Revoked and Determined, on the said first day of July, one thousand eight hundred and sixty-seven:

And further Know You, that We, reposing especial Trust and Confidence in the prudence, courage and loyalty of you, the said Charles Stanley, Viscount Monck, of our Special Grace, certain knowledge and mere motion, have thought fit to constitute and appoint, and we do by these Presents constitute and appoint you to be, on and after the said first day of July, one thousand eight hundred and sixty-seven, during Our pleasure, Our Governor-General of Canada; and We do hereby authorize, empower, require and command you thereafter, in due manner to do and execute all things that shall belong to your said Command and the Trust We have reposed in you, according to the several powers, provisions and of the said recited Act of Parliament, and according to such instructions as are herewith given to you, or which may from time to time hereafter be given to you, in respect of the said Dominion of Canada, under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us, through one of Our principal Secretaries of State, and according to such laws as are or shall be in force within Our said Dominion.

II. And We do hereby authorize and empower you to keep and use the Great Seal of Canada, for the sealing of all things whatsoever that shall pass the said Seal.

III. And We do further authorize and empower you to exercise all such powers as We may be at any time entitled to exercise, in respect of the constitution and appointment of Judges; and, in cases requisite, Commissioners of Oyer and Terminer, Justices of the Peace, and other necessary Officers and Ministers of Our said Dominion of Canada, for the better administration of Justice, and putting the Laws into execution.

IV. And we do hereby give and grant unto you, so far as We lawfully may, full power and authority, upon sufficient cause to you appearing, to remove from his Office or to suspend

from the exercise of the same, any person exercising any office or place within Our said Dominion, under or by virtue of any Commission or Warrant granted, or which may be granted by Us, in our name or under Our authority.

V. And We do hereby give and grant unto you full power and authority, when you shall see cause, in Our name and on Our behalf, to grant to any offender convicted of any crime in Court, or before any Judge, Justice or Magistrate within our said Dominion, a Pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to you may seem fit; and to remit any fines, penalties or forfeitures, which may become due and payable to Us.

VI. And We do hereby authorize you to exercise, from time to time as you may judge necessary, all powers belonging to Us, in respect of Assembling or Proroguing the Senate or the House of Commons; and We do hereby give the like authority to the several Lieutenant-Governors for the time being, of the Four Provinces in Our said Dominion, with respect to the Legislative Councils or the Legislative or General Assemblies of those Provinces respectively.

VII. And We do by these Presents authorize and empower you within our said Dominion, to exercise all such powers as We may be entitled to exercise therein, in respect of granting Licenses for Marriages, Letters of Administration and Probates of Wills, and with respect to the custody and management of Idiots and Lunatics, and their Estates; and to Present any person or persons to any Churches, Chapels or other Ecclesiastical Benefices, within Our said Provinces of Nova Scotia and New Brunswick, to which We shall from time to time be entitled to Present.

VIII. And whereas, by the said recited Act, it is amongst other things enacted, that it shall be lawful for Us, if We think fit, to authorize the Governor-General of Canada to appoint any person or persons jointly or severally to be his Deputy or Deputies within any part or parts of Canada, and in that capacity to exercise, during the pleasure of the Governor-General, such of the powers, authorities and functions of the Governor-General as he may deem it necessary or expedient to assign to him or them, subject to any limitations or directions from time

to time expressed or given by Us; now We do hereby authorize and empower you, subject to such limitations and directions as aforesaid, to appoint any person or persons jointly or severally, to be your Deputy or Deputies within any part or parts of Our Dominion of Canada, and in that capacity to exercise, during our pleasure, such of your powers, functions and authorities as you may deem it necessary or expedient to assign to him or them: Provided always, that the appointment of such Deputy or Deputies shall not affect the exercise of any such power, authority, or function by you, the said Charles Stanley, Viscount Monck, in person.

IX. And in case of your death, incapacity, or absence out of Our said Dominion, We do by these Presents give and grant, all and singular, the powers and authorities herein to you granted to Our Lieutenant-Governor for the time being of Our said Dominion of Canada, or in the absence of any such Lieutenant-Governor to such person as we may by Warrant under Our Sign Manual and Signet, appoint to be the Administrator of the Government of Our said Dominion, or in the absence of any such Lieutenant-Governor or person as aforesaid, to the senior Military Officer for the time being in command of Our regular forces in our said Dominion, such powers and authorities to be by him executed and enjoyed during our pleasure.

X. And We do hereby require and command all Our Officers and Ministers, civil and military, and all other inhabitants of Our said Dominion of Canada, to be obedient, aiding, and assisting unto you in the execution of this Our Commission, and of the powers and authorities herein contained.

3. *Commission of the Marquis of Lorne, 1878.*

Draft of a Commission passed under the Royal Sign Manual and Signet, appointing the Right Honourable the Marquis of Lorne, K.T., G.C.M.G., to be Governor-General of the Dominion of Canada. Dated 7th of October, 1878.

VICTORIA, R.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, Empress of India, To Our Right, Trusty, and Well-beloved Councillor Sir John Douglas Sutherland Campbell (commonly called the Marquis of Lorne), Knight of Our Most Ancient and Most Noble Order of the Thistle, Knight Grand Cross of our Most Distinguished Order of St. Michael and St. George, Greeting:

We do, by this Our Commission under our Sign-Manual and Signet, appoint you, the said Sir John Douglas Sutherland Campbell (commonly called the Marquis of Lorne), until Our further pleasure shall be signified, to be Our Governor-General in and over Our Dominion of Canada during Our will and pleasure, with all and singular the powers and authorities granted to the Governor-General of Our said Dominion in Our Letters Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland, constituting the Office of Governor, bearing date at Westminster the Fifth day of October, 1878, in the forty-second year of Our Reign, which said powers and authorities We do hereby authorize you to exercise and perform, according to such Orders and Instructions as Our said Governor-General for the time being hath already or may hereafter receive from Us. And for so doing this shall be your Warrant.

II. And we do hereby command all and singular Our officers, Ministers, and loving subjects in Our said Dominion, and all others whom it may concern, to take due notice hereof, and to give their ready obedience accordingly.

Given at Our Court at Balmoral, this Seventh day of October, 1878, in the Forty-second year of Our Reign.

By Her Majesty's Command,

M. E. HICKS-BEACH.

The formal distinction between the three documents, the Letters Patent, the Commission and the Instructions. — All three exemplify the theory that some Minister must be responsible for the acts of the Crown.

In the case of the Letters Patent, a warrant under the Sign Manual (signature) of the Sovereign and countersigned by one of the principal Secretaries of State, issues to the Lord Chancellor, authorizing him to affix the great seal.

In the case of the Commission, there is no warrant, but there is a Sign Manual and the Signet (one of the three seals of which each Secretary of State is possessed, the others being the lesser seal and the cachet). All bear the royal arms, and the Signet has the royal arms with supporters, together with a counter-signature of the Secretary of State.

Instructions are signed at the head by the Sovereign and initialed at the bottom, but there is no counter-signature of a Secretary of State, though the Signet is affixed.

A close comparison of the different Letters Patent, Instruction and Commission given above will be well repaid.

In 1878, the old plan of issuing new letters patent on the appointment of each Governor-General was abandoned, and permanent provision was made for the office by letters patent and a permanent set of instructions, and the actual appointment is made by a short commission.

Much of the older documents was meaningless and even misleading, as many of the things provided for therein were the subject of actual legislation. For instance, paragraph VII. in Lord Monck's instructions, no longer appears, and paragraph V. of the same is now provided for in the Instructions. Sir Edward Blake by his criticisms of the proposed form of letters patent, &c., in 1876, did much to put these matters on a proper footing. Clauses in the draft instructions to which he took especial objection required the keeping of exact minutes of the Council and their confirmation, which in practice was never done; provided for the Governor presiding at Council, which was clearly inexpedient, for consultation with the Council with certain exceptions, for action by the Governor in opposition to the advice of his Council in the exercise of the power given him by his commission.

As to this last clause, Sir Edward Blake said "the subcommittee assume that the power in question is to be exercised only in the rare instances in which, owing to the existence of substantial Imperial as distinguished from Canadian interests, it is considered that full freedom of action is not vested in the Canadian people.

All these provisions have now disappeared, though some apparently purposeless provisions are still retained, such as the power of summoning, proroguing and dissolving Parliament in the Letters Patent. Finally, it might be noticed, with reference to the power of pardon (now removed from Letters Patent to the instructions), which is dealt with in the text *supra*, that apparently the last time in which the power of pardon was exercised by a Governor without the advice of his responsible ministers was in 1875, when Alexander Lepine, sentenced to death for the murder of Thomas during the Red River Rebellion, was reprieved.

CHAPTER XV.

Magna Charta Annotated.

Magna Charta.

Made in the Ninth Year of King Henry the Third, and confirmed by King Edward the First in the Five and Twentieth Year of his Reign.

Edward by the Grace of God King of England, Lord of Ireland, and Duke of Guyan, to all Archbishops, Bishops, &c. We have seen the Great Charter of the Lord Henry, sometime King of England, our Father, of the Liberties of England, in these words: Henry by the grace of God, King of England, Lord of Ireland, Duke of Normandy and Guyan, and Earl of Anjou, to all Archbishops, Bishops, Abbots, Priors, Earls, Barons, Sheriffs, Provosts, Officers, and to all Bailiffs, and other our faithful Subjects, which shall see this present Charter, greeting. Know ye that we, unto the Honour of Almighty God, and for the salvation of the souls of our progenitors and successors Kings of England, to the advancement of holy Church, and amendment of our Realm of our meer and free will, have given and granted to all Archbishops, Bishops, Abbots, Priors, Earls, Barons, and to all freemen of this our realm, these liberties following, to be kept in our kingdom of England forever.

(This is known as an "Inspeximus.")

Cap. I.

A Confirmation of Liberties.

First, we have granted to God, and by this our present Charter have confirmed, for us and our Heirs forever, That the Church of England shall be free, and shall have all her whole rights and liberties inviolable.

(2) We have granted also, and given to all the freemen of our realm, for us and our Heirs for ever, these liberties underwritten, to have and to hold to them and their Heirs, of us and our Heirs for ever

(In confirming the liberties of the Church, the charter follows the accession of charter of Henry 1st, and probably the insertion of the clause may be regarded as merely formal and introductory).

Cap. II.

The Relief of the King's Tenant of Full Age.

If any of our Earls or Barons, or any other which hold of Us in chief by Knight's Service, die, and at the time of his death his heir be of full age, and oweth to us Relief, he shall have his inheritance by the old Relief; that is to say, the heir or heirs of an Earl, for a whole Earldom, by one hundred pound; the heir or heirs of a Baron, for an whole Barony, by one hundred marks; the heir or heirs of a Knight, for one whole Knight's fee, one hundred shillings at the most; and he that hath less, according to the old custom of the fees.

(Under the Charter of Henry I., these reliefs were to be "*justa et legitima.*" The relief itself appears to be a feudalised form of the ancient English heriot).

Cap. III.

The Wardship of an Heir within Age. The Heir a Knight.

But if the heir of any such be within age, his Lord shall not have the ward of him, nor of his land, before that he hath taken of him homage. (2) And after that such an heir hath been in ward (when he is come to full age), that is to say, to the age of one and twenty years, he shall have his inheritance without Relief, and without Fine; so that if such an heir, being within age, be made a Knight yet nevertheless his land shall remain in the keeping of his Lord unto the term aforesaid.

Cap. IV.

No Waste shall be made by a Guardian in Ward's Lands.

The keeper of the land of such an heir, being within age, shall not take of the lands of the heir, but reasonable issues, reasonable customs, and reasonable services, and that without destruction and waste of his men and his goods. (2) And if we commit the custody of any such land to the Sheriff, or to any other, which is answerable unto us for the issues of the same land, and he make destruction or waste of those things that he hath in custody, we will take of him amends and recompence therefore, (3) and the land shall be committed to two lawful and discreet men of that fee, which shall answer unto us for the issues of the same land, or unto him whom we will

assign. (4) And if we give or sell to any man the custody of any such land, and he therein do make destruction or waste, he shall lose the same custody; and it shall be assigned to two lawful and discreet men of that fee, which also in like manner shall be answerable to us, as afore is said.

(Under the charter of Henry I., the widow or next of kin was entitled to wardship, but the Assize of Northumberland in 1176 gave it to the lord. Neither wardship nor marriage, as feudal exactions, are a necessary part of the feudal system. It seems that they were not claimed in England until the time of William Rufus. At the age of 21 males (16 in the case of females) were entitled to ousterlemain or sue out their livery, *i.e.*, require the lands to be handed over to them on payment of half a year's profits).

Cap. V.

Guardians shall Maintain the Inheritance of their Wards and of Bishopricks, Etc.

The keeper, so long as he hath the custody of the land of such an heir, shall keep up the houses, parks, warrens, ponds, mills, and other things pertaining to the same land with the issues of the said land: and he shall deliver to the heir, when he cometh to his full age, all his land stored with ploughs, and all other things, at the least as he received it. All these things shall be observed in the custodies of Archbishopricks, Abbeys, Priories, Churches, and Dignities vacant, which appertain to us; except this, that such custody shall not be sold.

Cap. VI.

Heirs shall be Married without Disparagement.

Heirs shall be married without disparagement (*i.e.*, married to anyone who is not the peer of the heir or heiress).

(By a strained construction of this statute, "haeredes" was held to extend to heirs as well as to heiresses, and thereafter the marriage of any ward could be sold in open market).

Cap. VII.

A Widow shall have Her Marriage, Inheritance, and Quarantine. The King's Widow, Etc.

A widow, after the death of her husband, incontinent, and without any difficulty, shall have her marriage, and her inheri-

tance, (2) and shall give nothing for her dower, her marriage, or her inheritance, which her husband and she held the day of the death of her husband, (3) and she shall tarry in the chief house of her husband by forty days after the death of her husband, within which days her dower shall be assigned her (if it were not assigned her before), or that the house be a castle: (4) and if she depart from the castle, then a competent house shall be forthwith provided for her, in the which she may honestly dwell, until her dower be to her assigned, as it is aforesaid; and she shall have in the mean time her reasonable estovers of the common; (5) and for her dower shall be assigned unto her the third part of all the lands of her husband, which were his during coverture, except she were endowed of less at the Church-door. (6) No widow shall be distrained to marry herself; nevertheless she shall find surety, that she shall not marry without our license and assent (if she hold of us), nor without the assent of the Lord, if she hold of another.

It was by no means an uncommon practice to force a widow to marry again in order to obtain the fine payable for consent to the marriage: of dower there were many varieties, dower at the common law being a life estate in one-third of the lands, dower *ad ostium ecclesiae* (at the church door); dower *ex assenseu patris,* and dower *de la pluis beale.* Under the Statute of Uses (Henry VIII.) it became possible to avoid dower by assigning a jointure. Since 1833 dower cannot be claimed in England except upon an intestacy.

Cap. VIII.

How Sureties Shall be Charged to the King.

We or our Bailiffs shall not seise any land or any rent for any debt, as long as the present goods and chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to satisfy therefore. (2) Neither shall the pledges of the debtor be distrained, as long as the principal debtor is sufficient for the payment of the debt. (3) And if the principal debtor fail in payment of the debt, having nothing wherewith to pay, or will not pay where he is able, the pledges shall answer for the debt. (4) And if they will, they shall have the lands and rents of the debtor, until they be satisfied of that which they before payed for him, except that the debtor can shew himself to be acquitted against the said sureties.

(In the original charter two sections stand here relating to the Jews, and providing that debts due to the Jews are to bear no interest during the minority of an heir, and that the dower of the widow and necessaries for the children are to take priority of the debt.

The Jews, it must be remembered, were always under the direct control of the king, who taxed them as he pleased, sometimes to the extent of one-fourth of their property, and imposed fines upon them at his good pleasure. They were his special prey. "The Jews," says Abrahams in his Jewish Life in the Middle Ages, ch. xii., "were unwilling sponges by means of which a large part of the subject's wealth found its way into the royal exchequer." Their fiscal value to the Crown is attested by the existence of a separate exchequer for the Jews. "The king seemed to be absolute lord of their estates and effects. 'Tis true he let them enjoy their trade and acquests, but they seemed to trade and acquire for his profit as well as their own, for at one time or other their fortunes, or great part of them, came into his coffers" (Madox, History of the Exchequer, 2nd ed. 11, 221-261).

There follows in the original charter the provision forbidding the imposition of any scutage or aid, except by the common counsel of our realm, other than those for redeeming the king's body from captivity, for knighting his eldest son, and for once marrying his eldest daughter, and even these aids are to be reasonable. In like manner, adds the section, it shall be concerning the aids of the city of London.

The articles of the barons had added to the words city of London "and other places," but these words were for some reason omitted in the charter. There is here, then, no general prohibition of arbitrary taxation, merely a privilege from arbitrary taxation for a privileged and limited class.

The reason why this and the following clauses disappeared in the re-issues of the charter by Henry III., is that war was then being actively waged against Louis of France; it was a popular war and there can be no desire to hamper the executive; moreover, John, the tyrant, was dead, and it may have been thought only fair not to bind down the young king until he had been tried).

Cap. IX.

The Liberties of London, and other Cities and Towns, Confirmed.

The city of London shall have all the old liberties and customs which it hath been used to have. Moreover we will and grant, that all other Cities, Boroughs, Towns, and the Barons of the Five Ports, and all other Ports, shall have all their liberties and free customs.

(Still another omitted section follows: "And to take the common counsel of the realm in the imposition of an aid, other than in the three aforesaid cases, or in the imposition of scutage we will cause to be summoned archbishops, bishops, abbots, earls, and the greater barons by our writ severally, and moreover we will cause to be summoned in general, by our sheriffs and our bailiffs, all those who hold of us in chief (in capite) for a fixed day, that is to say, at a term of forty days at least, and for a fixed place, and in all the writs of summons we will set out the cause of the summons, and when the summons shall have been so given, let the business proceed on the appointed day in accordance with the advice of those who are present, although all those who have been summoned shall not have come.

This section probably only lays down the procedure in calling a National Council, which had already been followed throughout the reign of Henry II.

It is difficult to say who exactly are meant by the greater barons. Maitland thinks we can say very little more than that certain particular estates had come to be regarded as baronies and to pay the heavier relief (see Cap. II.). "Tenancy in chief is not sufficient now," he says, "to give a man this title of *baro;* he may hold in-chief and yet be merely *miles* (knight). The estate of the baron is a barony, but though there may be a theory floating about that the barony is or should be related to the knight's fee as the mark is related to the shilling, that is to say, that the barony should consist of thirteen knights' fees and a third—still it seems certain that an estate of this value was neither necessary nor in itself sufficient, to entitle the holder to the special summons."

With respect to the right of later days to a seat in the House of Lords, Sir William Anson says that tenure of the Crown

created a liability though it did not give a right to a writ of summons; and that the estate of the baronage was ultimately constituted and defined, not by conditions of birth or of tenure, but by the exercise of the royal prerogative in issuing the writ of summons.

Towards the beginning of the 14th century it becomes established that a person who receives a writ of summons, and in obedience to it takes his seat in the House of Lords, is the founder of an hereditary peerage. (See The Clifton Case, Collins, 292).

The early likeness of a peerage to an interest in land is exemplified by the fact that claims were made to sell a peerage to another, or to have a peerage by virtue of the possession of certain lands.

These questions are now settled in the negative. See The Berkeley Peerage Case, 8 H. L. C. 1; in other words, baronies by tenure exist no longer.

The Crown may create a life peerage, but the holder will not be entitled to a seat in the House of Lords. That right can only be given by statute, as it has been given to the Lords of Appeal in Ordinary.

A scutage, *i.e.*, a money payment in lieu of personal service in the army, was instituted in 1159, and was one of the first marks of the decline of feudalism as a political force.

By the 15th section (omitted from Henry's Charter), the mesne lord is restricted to the three customary aids).

Cap. X.

None Shall Distrain for More Service than is Due.

No man shall be distrained to do more service for a Knight's fee, nor any freehold, than therefore is due.

Cap. XI.

Common Pleas shall not Follow the King's Court.

Common Pleas shall not follow our Court, but shall be held in some place certain.

Cap. XII.

Where and Before Whom Assizes Shall be Taken. Adjournment for Difficulty.

Assizes of *novel disseisin*, and of *Mortdancester*, shall not be taken but in the shires, and after this manner: If we be out of this realm, our chief Justicer shall send our Justicers through every County once in the year, which, with the Knights of the shires, shall take the said Assizes in those Counties; (2) and those things that at the coming of our foresaid Justicers, being sent to take those Assizes in the Counties, cannot be determined, shall be ended by them in some other place in their circuit; (3) and those things, which for difficulty of some articles cannot be determined by them, shall be referred to our Justicers of the Bench, and there shall be ended.

Cap. XIII.

Assizes of Darrein Presentment.

Assizes of Darrein Presentment shall be alway taken before our Justices of the Bench, and there shall be determined.

(The assizes mentioned in these two sections were the possessory assizes. Henry II. was astute enough to take possession of land, as distinguished from ownership entirely under his own jurisdiction. Ownership of land could be adjudicated upon in the feudal courts if, after Henry II., a writ of right or king's writ should direct it. It is true that the case could be removed or 'lifted' by a writ of tolt into the King's Court, where it would be tried by an assisa or jury of neighbours. This was known as the Grand Assize, but the procedure thereon was so highly technical, and a flaw therein so fatal to the proceedings, that persons claiming ownership preferred to rely on the possessory assizes, which were much simpler.

The theory at the back of the Assize of Novel Disseisin (1166), *i.e.*, Recent Dispossession, was that a man has no right to put another out of possession of lands without a judgment of the Court, accordingly if a man had been recently in possession of land and was expelled, he would be put back into possession without any question as to title or ownership.

By the Assize of Mort á ancestor, relief was given where the person seeking it was the heir of the person dispossessed, but never had been in possession himself.

The Assize of Darrein Presentment settled questions as to the right to make appointments to benefices, by settling who last exercised the power, or in other words, who was in possession of the right.)

Cap. XIV.

How Men of all Sorts Shall be Amerced, and by Whom.

A Freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contentement; (2) and a merchant likewise, saving to him his merchandise; (3) and any other's villain than ours shall be likewise amerced, saving his wainage, if he fall into our mercy. (4) And none of the said Amerciaments shall be assessed, but by the oath of honest and lawful men of the vicinage. (5) Earls and Barons shall not be amerced but by their Peers, and after the manner of their offence. (6) No man of the Church shall be amerced after the quantity of his spiritual Benefice, but after his Lay-tenement, and after the quantity of his offence.

Amercement was a pecuniary punishment or penalty assessed by the peers or equals of the party amerced for an offence, by the commission of which he had placed himself at the mercy of the lord. The difference between amercements and fines is as follows: The latter are certain and are created by some statute; they can only be imposed and assessed by Courts of record; the former are arbitrarily imposed by Courts not of record, as Courts leet (Termes de la Ley. 40).

Contenement is a man's countenance or credit, which he has with and by reason of his freehold; or that which is necessary for the support and maintenance of men, agreeably to their several qualities of life.

Wainage is the countenance of a villein, that which is necessary for the cultivation of land.

Cap. XV.

Making of Bridges and Banks.

No Town or Freeman shall be distrained to make Bridges nor Banks, but such as of old time and of right have been accustomed to make them in the time of King Henry our Grandfather.

(It appears that King John in visiting districts, for the purposes of sport, grievously oppressed the people of the neighbourhood in this way.)

Cap. XVI.

Defending of Banks.

No Banks shall be defended from henceforth, but such as were in defence in the time of King Henry our Grandfather, by the same places, and the same bounds, as they were wont to be in his time.

Cap. XVII.

Holding Pleas of the Crown.

No Sheriff, Constable, Escheator, Coroner, nor any other our Bailiffs, shall hold Pleas of our Crown.

(The effect of this provision is that henceforth there could be no trial of any case, in which a breach of the King's Peace was involved, save before the King's judges. Presentments and indictments continued to be taken in the local courts, but actual trials were reserved for the visits of the King's justices. It is clear that a wish for the King's justice, as more certain and unbiased, was making itself strongly felt.

Here follows in the original version a provision that the *firma comitatus,* the ferm of the shire, *i.e.,* the sum payable to the king by the various shires, hundreds, wapentakes and ridings, should remain fixed and not be subject to increase, except in the case of the manors in the Royal demesne. It was the practice of the kings to farm out this revenue to the highest bidder, who recouped himself by exactions from the people.

Wapentake was the name given to a hundred in the north-east of England; whilst a riding is a thirding or third of a hundred).

Cap. XVIII.

The King's Debtor Dying, the King shall be First Paid.

If any that holdeth of us Lay-fee do die, and our Sheriff or Bailiff do shew our Letters Patents of our summons for Debt, which the dead man did owe to us; it shall be lawful to our Sheriff or Bailiff to attach and inroll all the goods and chattles of the dead, being found in the said fee, to the value of the same debt, by the sight and testimony of lawful men, so that nothing

thereof shall be taken away, until we be clearly paid off the debt; (2) and the residue shall remain to the Executors to perform the testament of the dead; (3) and if nothing be owing unto us, all the chattles shall go to the use of the dead (saving to his wife and children their reasonable parts).

(The 'reasonable part' of a wife in her husband's goods and chattels was one-third, that of the children one-third, the third third he could dispose of by will. Down to the reign of Charles I. this right to a *rationabilis pars* existed, but about the beginning of the reign of George I. the right to the reasonable part (then existent only in London) was taken away by statute.

Where there was no will, the king could administer, but more frequently he granted this profitable franchise to lords of manors. In time this right passed to the Ordinary or Bishop, and was greatly abused. Hence by the Statute of Westminster II. (1285), it was enacted that the Ordinary should be bound to pay the debts of the intestate, so far as his goods extended, in the same manner as executors were bound in the case of a will. In Edward III.'s reign, the Ordinary was required in case of intestacy, to depute the next and most lawful friend of the deceased to administer his goods. This was construed to mean the next-of-kin, but in the reign of Henry VIII. the judge gains the power of committing administration to the widow.)

CAP. XIX.

Purveyance for a Castle.

No Constable, nor his Bailiff, shall take corn or other chattles of any man, if the man be not of the Town where the Castle is, but he shall forthwith pay for the same, unless that the will of the seller was to respite the payment; (2) and if he be of the same Town, the price shall be paid unto him within forty days.

(This right of purveyance was the right of the king and his servants 'to buy provisions at the lowest rate, to compel the owners to sell, and to pay at their own time — which often enough meant never' (Maitland). The claim to the right persisted and was abolished when feudal tenures were abolished, but persisted throughout the Stuart period, at any rate, in a new form, *i.e.*, of the right of billeting soldiers).

Cap. XX.

Doing of Castle-ward.

No Constable shall distrain any Knight for to give money for keeping of his Castle, if he himself will do it in his proper person, or cause it to be done by another sufficient man, if he may not do it himself for a reasonable cause. (2) And if he do lead or send him in an army, he shall be free from Castle-ward for the time that he shall be with us in fee in our host, for the which he hath done service in our wars.

Cap. XXI.

Taking of Horses, Carts, and Wood.

No Sheriff nor Bailiff of ours, or any other, shall take the Horses or Carts of any man to make carriage, except he pay the old price limited, that is to say, for carriage with two horse, x. d. a day; for three horse, xiv. d. a day. (2) No demesne Cart of any Spiritual person or Knight, or any Lord, shall be taken by our Bailiffs; (3) nor we, nor our Bailiffs, nor any other, shall take any man's wood for our Castles, or other our necessaries to be done, but by the license of him whose the wood is.

Cap. XXII.

How Long Felon's Lands shall be Holden by the King.

We will not hold the lands of them that be convict of Felony but one year and one day, and then those lands shall be delivered to the Lords of the fee.

Cap. XXIII.

In what Places Wears shall be put Down.

All Wears from henceforth shall be utterly put down by Thames and Medway, and through all England, but only by the sea-coasts.

(The object of this was to prevent encroachment on the public right of fishing).

Cap. XXIV.

In what Case a Praecipe in Capite is not Grantable.

The Writ that is called *Praecipe in capite* shall be from henceforth granted to no person of any freehold, whereby any freeman may lose his Court.

(The writ of *praecipe* (*in capite or praecipe quod reddat*) was the writ by which the royal Courts encroached on the manorial Courts. It directed the sheriff to command someone to return land or chattels unjustly detained to another. Disobedience to the writ was disobedience to the king and became cognisable by the Royal Courts).

Cap. XXV.

There Shall be but One Measure Throughout the Realm.

One Measure of Wine shall be through our Realm, and one Measure of Ale, and one Measure of Corn, that is to say, the Quarter of London; and one breadth of dyed Cloth, Russets, and Haberjects, that is to say, two Yards within the lists. (2) And it shall be of Weights as it is of Measures.

(A Haberject was a cloth of a mixed colour.)

Cap. XXVI.

Inquisition of Life Member.

Nothing from henceforth shall be given for a Writ of Inquisition, nor taken of him that prayeth Inquisition of Life, or of Member, but it shall be granted freely, and not denied.

(The writ here referred to is the writ *de odio et atia*, which commanded the sheriff to inquire whether a prisoner charged with murder was committed on general cause of suspicion or merely *propter odium et atiam*, *i.e.*, for hatred and ill-will, with a view to issuing a further writ to admit him to bail to wait the Iter of the King's Justices. The writ originally only issued by Royal Favour, and was a favourite instrument of extortion during John's reign.)

Cap. XXVII.

Tenure of the King in Socage, and of Another by Knights Service. Petit Serjeanty.

If any do hold of us by Fee-ferm, or by Socage, or Burgage, and he holdeth Lands of another by Knights Service, we will not have the custody of his heir, nor of his Land, which is holden of the Fee of another, by reason of that Fee-ferm, Socage, or Burgage. (2) Neither will we have the custody of such Fee-ferm, or Socage, or Burgage, except Knights Service be due unto us out of the same Fee-ferm. (3) We will not have the custody of the heir, or of any Land which he holds

of another by Knights Service, by occasion of any Petit Serjeanty, that any man holdeth of us by Service to pay a Knife, an Arrow, or the like.

(A Fee-ferm is an estate in fee granted in perpetuity subject to a rent for so much as it is reasonably worth. Burgage is merely a species of Socage whereby houses are held by a certain rent. One noteworthy species is Borough English, in which the land descends to the youngest son.)

Cap. XXVIII.

Wager of Law shall not be without Witness.

No Bailiff from henceforth shall put any man to his open Law, nor to an Oath, upon his own bare saying, without faithful Witnesses brought in for the same.

(This refers to the method of trial known as the wager of law, which was a relic of the old English trial by compurgators, described by Maitland in his second lecture on Forms of Action in the following words: "It is adjudged for example in an action for debt that the defendant do prove his assertion that he owes nothing by his own oath and the oaths of a certain number of compurgators or oath helpers. The defendant must then solemnly swear that he owes nothing, and his oath-helpers must swear that his oath is clean and unperjured. If they safely get through this ceremony, punctually repeating the right formula, there is an end of the case; the plaintiff, if he is hardy enough to go on, can only do so by bringing a new charge, a criminal charge of perjury against them. They have not come there to convince the Court, they have not come there to be examined and cross-examined like modern witnesses, they have come there to bring upon themselves the wrath of God, if what they say be not true." This process is known in England as 'making one's law'; a litigant who is adjudged to prove his case in this way is said to 'wage his law' (*vadiare legem*), when he finds security that on a future day he will bring compurgators and perform this solemnity; then when on the appointed day he comes and performs that ceremony with success, he is said 'to make his law' (*facere legem*). Wager of law was not abolished formally till 1835; see an actual instance in 1824 in *King* v. *Williams*. 2 B. & C. 538.

Before a man could be put to his oath, the accuser had to produce his witnesses. This practice became obsolete in the reign of Edward III., when the fictitious John Doe and Richard Roe make their appearance as pledgers of prosecution.

It may be that here there is a reference to the ordeal. In that case the section would mean that no one was to go to the ordeal, except on the presentment of a jury of the hundred. On the other hand, the ordeal was in effect abolished by the Lateran Council in 1215, and we find this section in the reissues of Henry V.)

Cap. XXIX.

None Shall Be Condemned without Trial. Justice Shall Not be Sold or Deferred.

No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him nor condemn him, but by lawful judgment of his peers, or by the law of the land. (2) We will sell to no man, we will not deny or defer to any man either justice or right.

Cap. XXX.

Merchant Strangers Coming into this Realm Shall be Well Used.

All merchants (if they were not openly prohibited before) shall have their safe and sure conduct to depart out of England, to come into England, to tarry in, and go through England, as well by land as by water, to buy and sell without any manner of evil tolts by the old and rightful customs, except in time of war. (2) And if they be of a land making war against us, and be found in our realm at the beginning of the wars, they shall be attached without harm of body or goods, until it be known unto us, or our Chief Justice, how our merchants be intreated there in the land making war against us; (3) and if our merchants be well intreated there, theirs shall be likewise with us.

(In the original issue, here follows a section permitting free ingress to and egress from the kingdom except in time of war. It was reserved for further consideration in Henry III's first reissue and was never afterwards.

As to "evil tolts" and the "old and rightful customs," see under Taxation.)

Cap. XXXI.

Tenure of a Barony Coming into the King's Hands by Eschete.

If any man hold of any eschete, as of the honour of Wallingford, Nottingham, Bolin, or of any other eschetes which be in our hands, and are baronies, and die, his heir shall give none other relief, nor do none other service to us, than he should to the baron, if it were in the baron's hand. (2) And we in the same wise shall hold it as the baron held it; neither shall we have, by occasion of any barony or eschete, any eschete or keeping of any of our men, unless he that held the barony or eschete elsewhere held of us in chief.

(Here follows in the earlier issue a provision that persons dwelling without the limits of a forest should not be compelled to attend Forest Courts upon common summons, unless they themselves were impleaded or were pledges for another.

By the Assize of Woodstock in 1184, Henry II. compelled persons to attend the King's Forest Courts held before the warden and forester, who presented criminals before the itinerant justices in eyre of the forest, in the same way as ordinary criminals were presented by the county before the ordinary justices in eyre. These provisions were embodied in the Carta de Forestâ granted by Henry III. (1217). These powers as to forests are now vested in His Majesty's Commissioners of Woods, Forests, and Land Revenues.

Next is an omitted provision that the king will only appoint judges, constables, sheriffs and bailiffs of such as know the law and mean duly to observe it.

Next are omitted provisions providing for disafforestation of forest afforested in John's time and for the removal of other forest evils, the surrender of charters and hostages placed in the king's hands as securities, the dismissal of foreign servants and mercenary troops, doing justice to the Welsh and Scotch, and granting a general political amnesty).

Cap. XXXII.

Lands Shall not be Aliened to the Prejudice of the Lord's Service.

No freeman from henceforth shall give or sell any more of his land, but so that of the residue of the lands the Lord of the Fee may have the service due to him, which belongeth to the fee.

(This is not in the original issue).

(This was aimed at the practice of sub-infeudation. The provision itself was abrogated by the Statute of Quia Emptores, 18 Edw. I. c. 1, whereby sub-infeudation was entirely forbidden, and every freeman was allowed to alienc his land (save by will) or part, to be held not of the alienor, but of the lord from whom the latter held. Even after this provision, tenants in capite could not aliene without the license of the king, but by 1 Edw. III. c. 12, even tenants in capite were allowed to aliene on payment of a reasonable fine to the king.)

Cap. XXXIII.

Patrons of Abbies Shall Have the Custody of them in the Time of Vacation.

All patrons of abbies, which have the King's Charters of England of Advowson, or have old tenure or possession in the same, shall have the custody of them when they fall void, as it hath been accustomed, and as it is afore declared.

Cap. XXXIV.

In what only Case a Woman shall have an Appeal of Death.

No man shall be taken or imprisoned upon the appeal of a woman for the death of any other, than of her husband.

(From the time of the Norman Conquest, the regular method of bringing a criminal to trial was by the "appeal," *i.e.* a private accusation which led to battle (in civil cases a champion could be employed, so also in the case of a corporation). In criminal "appeals" the parties were obliged to fight personally, unless the appellant was a woman, a priest, an infant, lame, blind or sixty years old; in that case the appellee put himself on his country, *i.e.* was tried by a jury, and it seems that sometimes this right could be purchased from the King's Courts.

The 'appellum' or appeal was entirely a Norman institution, and was looked upon with great disfavor by the Saxons.

The battle was held in special lists before the judges of the Court of Common Pleas, who clad in scarlet robes watched the combatants fighting with ell-long staves, from the rising of the sun to that of the stars, unless one of them before that uttered the horrible word "craven."

If the appellee was worsted in the fight, he met with the same penalty as if he had been convicted on an indictment.

The Crown could not pardon him, as an appeal was considered as being a private suit.

The 'appeal' was not formally abolished till 1819. The abolition was on account of the claim of Thornton, the appellee in the suit of *Ashford* v. *Thornton* (1 B. and Ald. 405) to trial by battle. The appellor declined and the appellee was discharged; and, on being arraigned on the Crown side of the Court, successfully pleaded '*autrefois acquit.*'

The report makes strange reading: "The appellee being brought into Court and placed at the bar, and the appellant being also in Court, the count was again read over to him and he was called upon to plead. He pleaded as follows: 'Not guilty ; and I am ready to defend the same by my body,' and thereupon taking his glove off, he threw it upon the floor of the Court.")

Cap. XXXV.

At what Time shall be Kept a County Court, Sheriff's Turn, and a Leet.

No County Court from henceforth shall be holden, but from month to month; and where greater time hath been used, there shall be greater. (2) Nor any sheriff, or his bailiff, shall keep his turn in the hundred but twice in the year; and no where but in due place, and accustomed; that is to say, once after Easter, and again after the Feast of Saint Michael. (3) And the view of Frankpledge shall be likewise at the Feast of Saint Michael without occasion; so that every man may have his liberties which he had, or used to have, in the time of King Henry, our Grandfather, or which he hath purchased since. (4) The View of Frankpledge shall be so done, that our peace may be kept; (5) and that the tything be wholly kept as it hath been accustomed; (6) and that the sheriff seek no occasions, and that he be content with so much as the sheriff was wont to have for his view-making in the time of King Henry our Grandfather.

(The sheriff's tourn or turn was the occasion on which the sheriff went into each County Court in the shire, as officer of the king, to hold the view of frankpledge, and to receive fines and other moneys payable to the king. Frankpledge and Tything have been dealt with *supra*).

Cap. XXXVI.

No Land Shall be Given in Mortmain.

It shall not be lawful from henceforth to any to give his lands to any religious house, and to take the same land again to hold of the same house. Nor shall it be lawful to any house of religion to take the lands of any, and to lease the same to him of whom he received it. If any from henceforth give his lands to any religious house, and thereupon be convict, the gift shall be utterly void, and the land shall accrue to the Lord of the Fee.

(This is aimed at the practice of granting lands to religious houses and receiving them back again freed from feudal obligations, as religious houses were not subject to these. The present provision was construed by Edward I.'s statute De Religiosis to refer to all grants to religious houses, whether fraudulent or not.)

Cap. XXXVII.

A Subsidy in respect of this Charter, and the Charter of the Forest, Granted to the King.

Scutage from henceforth shall be taken like as it was wont to be in the time of King Henry our Grandfather; reserving to all archbishops, bishops, abbots, priors, templers, hospitallers, earls, barons, and all persons as well spiritual as temporal all their free liberties and free customs, which they have had in time passed. (2) And all these customs and liberties aforesaid, which we have granted to be holden within this our realm, as much as appertaineth to us and our heirs, we shall observe; (3) and all men of this our realm, as well spiritual as temporal (as much as in them is), shall observe the same against all persons in like wise. (4) And for this our gift and grant of these liberties, and of other contained in our Charter of Liberties of our Forest, the archbishops, bishops, abbots, priors, earls, barons, knights, freeholders, and other our subjects, have given unto us the fifteenth part of all their moveables. (5) And we have granted unto them on the other part that neither we, nor our heirs, shall procure or do any thing whereby the Liberties in this Charter contained shall be infringed or broken; (6) and if any thing be procured by any person contrary to the premises, it shall be had of no force

nor effect. These being witnesses : Lord S. Archbishop of Canterbury, E. Bishop of London, J. Bishop of Bathe, P. of Winchester, H. of Lincoln, R. of Salisbury, W. of Rochester W. of Worcester, J. of Ely, H. of Hereford, R. of Chichester, W. of Exeter, Bishops, the Abbot of St. Edmonds, the Abbot of St. Albans, the Abbot of Bello, the Abbot of St. Augustines in Canterbury, the Abbot of Evesham, the Abbot of Westminister, the Abbot of Bourgh St. Peter, the Abbot of Reding, the Abbot of Abindon, the Abbot of Malmsbury, the Abbot of Winchcomb, the Abbot of Hyde, the Abbot of Certesey, the Abbot of Sherburn, the Abbot of Cerne, the Abbot of Abbotebir, the Abbot of Middleton, the Abbot of Seleby, the Abbot of Cirencester; H. de Burgh Justice, H. Earl of Chester and Lincoln, W. Earl of Salisbury, W. Earl of Warren, G. de Clare Earl of Gloucester and Hereford, W. de Ferrars Earl of Derby, W. de Mandeville Earl of Essex, H. de Bygod Earl of Norfolk, W. Earl of Albemarle, H. Earl of Hereford, J. Constable of Chester, R. de Ros, R. Fitzwalter, R. de Vyponte, W. de Bruer, R. de Montefichet, P. Fitzherbert, W. de Aubenie, F. Gresly, W. de Breus, J. de Monemue, J. Fitzallen, H. de Mortimer, W. de Beuchamp, W. de St. John, P. de Mauli, Brian de Lisle, Thomas de Multon, R. de Argenteyn, G. de Nevil, W. de Mauduit, J. de Balun, and others. Given at Westm' the 11th day of Febr' the 9th year of our Reign.

II. We, ratifying and approving these Gifts and Grants aforesaid, confirm and make strong all the same for us and our heirs perpetually, and by the tenour of these Presents, do renew the same; willing and granting for us and our heirs, that this Charter, and all and singular his Articles, for ever shall be steadfastly, firmly, and inviolably observed; and if any Article in the same Charter contained, yet hitherto peradventure hath not been kept, we will, and by Authority Royal command, from henceforth firmly they be observed. In witness whereof we have caused these our Letters Patents to be made. T. Edward our Son at Westminster, the Twenty-eighth day of March, in the Twenty-eighth year of our Reign.

(The imposition of a tax upon personal property to the extent of one-fifteenth, points the necessity of imposing regulated taxation consequent upon the insistence that the unregulated imposition of tallages should be given up).

Confirmatio Cartarum.

Edward, by the grace of God, king of England, lord of Ireland, and duke of Guyenne, to all those that these present letters shall hear or see, Greeting.

1. Know ye that we to the honor of God, and of holy Church and to the profit of our realm, have granted for us and our heirs, that the great Charter of Liberties, and the Charter of the Forest, which were made by common assent of all the realm, in the time of king Henry our father, shall be kept in every point without breach. And we will that the same charters shall be sent under our seal, as well to our justices of the forest, as to others, and to all sheriffs of shires, and to all our other officers, and to all our cities throughout the realm, together with our writs, in the which it shall be contained, that they cause the aforesaid charters to be published, and to declare to the people that we have confirmed them in all points; and to our justices, sheriffs, mayors, and other ministers, which under us and by us have the laws of our land to guide, that they shall allow the same charters in all their points, in pleas before them, and in judgements ; that is to wit, the Great Charter as the common law, and the Charter of the Forest according to the assize of the forest, for the wealth of our realm.

2. And we will, that if any judgement be given from henceforth contrary to the points of the charters aforesaid by the justices, or by any other our ministers that hold plea before them against the points of the charters, it shall be undone and holden for nought.

3. And we will, that the same charters be sent, under our seal, to cathedral churches throughout our realm, there to remain, and shall be read before the people two times each year.

4. And that all archbishops and bishops shall pronounce the sentence of great excommunication against all those that by deed, aid, or counsel do contrary to the aforesaid charters, or that in any point break or undo them. And that the said curses be twice a year denounced and published by the prelates aforesaid. And if the same prelates, bishops, or any of them be remiss in the denunciation of the said sentences, the archbishops of Canterbury and York, for the time being, as is fitting, shall compel and distrain them to make that denunciation in form aforesaid.

5. And for so much as divers people of our realm are in fear, that the aids and tasks which they have given to us beforetime, towards our wars and other business, of their own grant and good will, howsoever they were made, might turn to a bondage to them and their heirs, because they might be at another time found in the rolls, and so likewise the prises taken throughout the realm by our ministers in our name; we have granted for us and our heirs, that we shall not draw such aids, tasks, nor prises into a custom, for any thing that hath been done heretofore, or that may be found by roll or in any other manner.

6. Moreover, we have granted for us and our heirs as well to archbishops, bishops, abbots, priors, and other folk of holy Church, as also to earls, barons, and to all the commonalty of the land, that for no business from henceforth we shall take of our realm such manner of aids, tasks nor prises, but by the common assent of all the realm, and for the common profit thereof, saving the ancient aids and prises due and accustomed.

And for so much as the more part of the commonalty of the realm find themselves sore aggrieved with the maletote of wools, that is to wit, a toll of forty shillings for every sack of wool, and have made petition to us to release the same ; we at their requests have clearly released it, and have granted that we will not take such thing nor any other without their common assent and good will; saving to us and our heirs the custom of wools, skins, and leather, granted before by the commonalty aforesaid. In witness of which things we have caused these our letters to be made patents.

Witness Edward our son at London the tenth day of October, the five and twentieth year of our reign.

And be it remembered that this same charter, in the same terms, word for word, was sealed in Flanders under the King's great seal, that is to say, at Ghent the fifth day of November in the twenty-fifth year of the reign of our aforesaid lord the king, and sent into England.

CHAPTER XVI.

The Petition of Right—Annotated.

The Petition of Right (1628).

To the King's Most Excellent Majesty.

Humbly show unto our Sovereign Lord the King, the Lords Spiritual and Temporal, and Commons in Parliament assembled, that whereas it is declared and enacted by a statute made in the time of the reign of King Edward the First, commonly called Statutum de tallagio non concedendo, that no tallage or aid shall be laid or levied by the King or his heirs in this realm, without the good will and assent of the Archbishops, Bishops, Earls, Barons, Knights, Burgesses, and other the freemen of the commonalty of this realm: and by authority of Parliament holden in the five and twentieth year of the reign of King Edward the Third, it is declared and enacted, that from henceforth no person shall be compelled to make any loans to the King against his will, because such loans were against reason and the franchise of the land; and by other laws of this realm it is provided, that none should be charged by any charge of imposition, called a Benevolence, nor by such like charge; by which, the statutes before mentioned and other the good laws and statutes of this realm, your subjects have inherited this freedom, that they should not be compelled to contribute to any tax, tallage, aid or other like charge, not set by common consent in Parliament:

II. Yet nevertheless, of late divers commissions directed to sundry commissioners in several counties with instructions, have issued, by means whereof your people have been in divers places assembled, and required to lend certain sums of money unto your Majesty, and many of them upon their refusal so to do, have had an oath administered unto them, not warrantable by the laws or statutes of this realm, and have been constrained to become bound to make appearance and give attendance before your Privy Council, and in other places, and others of them have been therefore imprisoned, confined, and sundry other ways molested and disquieted: and divers other charges have been laid and levied upon your people in several counties, by Lord Lieutenants, Deputy Lieutenants,

Commissioners for Musters, Justices of Peace and others, by command or direction from your Majesty or your Privy Council, against the laws and free customs of this realm.

III. And where also by the statute called, 'The Great Charter of the Liberties of England,' it is declared and enacted, that no freeman may be taken or imprisoned or be disseised of his freehold or liberties, or his free customs or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land;

IV. And in the eight and twentieth year of the reign of King Edward the Third, it was declared and enacted by authority of Parliament, that no man of what estate or condition that he be, should be put out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of law:

V. Nevertheless, against the tenor of the said statutes and other the good laws and statutes of your realm, to that end provided, divers of your subjects have of late been imprisoned, without any cause showed, and when for their deliverance they were brought before your Justices, by your Majesty's writs of Habeas Corpus, there to undergo and receive as the Court should order, and their keepers commanded to certify the causes of their detainer; no cause was certified, but that they were detained by your Majesty's special command, signified by the Lords of your Privy Council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the law.

VI. And whereas of late great companies of soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourn, against the laws and customs of this realm, and to the great grievance and vexation of the people.

VII. And whereas also by authority of Parliament in the 25th year of the reign of King Edward the Third, it is declared and enacted, that no man shall be forejudged of life or limb against the form of the Great Charter and the law of the land; and by the said Great Charter and other the laws and the statutes of this your realm, no man ought to be adjudged to death, but by the laws established in this your realm, either by the customs of the same realm or by Acts of Parliament:

and whereas no offender of what kind soever is exempted from the proceedings to be used, and punishments to be inflicted by the laws and statutes of this your realm; nevertheless of late divers commissions under your Majesty's Great Seal have issued forth, by which certain persons have been assigned and appointed Commissioners with power and authority to proceed within the land, according to the justice of martial law against such soldiers and mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanour whatsoever, and by such summary course and order, as is agreeable to martial law, and is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death, according to the law martial:

VIII. By pretext whereof, some of your Majesty's subjects have been by some of the said Commissioners put to death, when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might, and by no other ought to have been, judged and executed.

IX. And also sundry grievous offenders by colour thereof, claiming an exemption, have escaped the punishments due to them by the laws and statutes of this your realm, by reason that divers of your officers and ministers of justice have unjustly refused, or forborne to proceed against such offenders according to the same laws and statutes, upon pretence that the said offenders were punishable only by martial law, and by authority of such commissions as aforesaid; which commissions, and all other of like nature, are wholly and directly contrary to the said laws and statutes of this your realm.

X. They do therefore humbly pray your Most Excellent Majesty, that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by Act of Parliament; and that none be called to make answer, or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same, or for refusal thereof; and that no freeman, in any such manner as is before-mentioned, be imprisoned or detained; and that your Majesty will be pleased to remove the said soldiers and marines, and that your people may not be so burdened in time to come; and that the aforesaid commissions for proceeding by martial law, may be revoked and

annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever, to be executed as aforesaid, lest by colour of them any of your Majesty's subjects be destroyed or put to death, contrary to the laws and franchise of the land.

XI. All which they most humbly pray of your Most Excellent Majesty, as their rights and liberties according to the laws and statutes of this realm: and that your Majesty would also vouchsafe to declare, that the awards, doings, and proceedings to the prejudice of your people, in any of the premises, shall not be drawn hereafter into consequence or example; and that your Majesty would be also graciously pleased, for the further comfort and safety of your people, to declare your royal will and pleasure, that in the things aforesaid all your officers and ministers shall serve you, according to the laws and statutes of this realm, as they tender the honour of your Majesty, and the prosperity of this kingdom.

(Which Petition being read the 2nd of June, 1628, the King's answer was thus delivered unto it:

The King willeth that right be done according to the laws and customs of the realm; and that the statutes be put in due execution, that his subjects may have no cause to complain of any wrong or oppressions, contrary to their just rights and liberties, to the preservation whereof he holds himself as well obliged as of his prerogative.

On June 7 the answer was given in the accustomed form, Soit Droit Fait Come il est desiré).

(Notice that this is the form of an answer to a petition: the assent of the king to a bill runs: "le roy le veult," and his dissent runs: "le roy s'avisera").

Commissioners of Musters.

The old feudal levy, service wherein depended on the tenure of land under the king, was abolished at the restoration, but there still remained the general liability to serve in the Fyrd or National militia incumbent on every able-bodied male between 16 and 60. Men raised under this were inspected and trained from time to time by commissioners of musters during the Stuart period. These forces were known as train bands or trained bands; the expenses fell upon the county and the lord lieutenant of the county was their statutory officer, but

otherwise there was no regimental organization. This force was regarded as the army of the state, as distinguished from the standing army, which was more especially the army of the king. It was not until 1871 that the control of the militia was taken away from the lord lieutenant of the county, and virtually ceased to exist as a body distinct from the regular forces.

The first form of benevolence was a 'forced loan,' popular with both Edward II. and Richard II., but in the reign of Edward IV. the pretence of repayment was abandoned and that of a freewill offering substituted under the name of 'benevolence.' This instrument of extortion was too useful to be lightly abandoned, and under the Tudors and James I. the exactions were frequent, witness the 'loving contribution' under Henry VIII., failure to pay which involved punishment at the hands of the Council.

Justice of the Peace.

The office of a Justice of the Peace is as old as the reign of Edward I., their importance being augmented by a statute of Edward IV., which took away from the sheriff's tourn the power of hearing and determining criminal charges. Prior to 34 Edw. III. c. 1, they were appointed by the freeholders of the county, but the power then passed to the Crown.

Habeas Corpus.

This writ was first used to bring cases from the feudal or private courts before the King's Court. It was a prerogative writ. Under early English law every man before trial had a right to find "pledges," *i.e.* to be "replevied," unless he was accused of treason, murder, forest offences, and in a few other cases, committed to prison by the king's command. Refusal to admit to bail could be brought before the King's Bench, which could admit to bail a person accused of treason or murder; but it was disputed as to whether the King's Bench could on a writ of habeas corpus release a person, before trial, who was committed to prison by the King's, *i.e.* the Council's commands. In the case of the five Knights committed to gaol for refusal to contribute to a benevolence (commonly called Darnel's case), the matter was decided in the favour of the King.

In the reign of Charles II., 1679, the Habeas Corpus Act was passed giving the writ to any one committed for trial, unless the warrant of commitment plainly expressed committal for treason or felony. The writ was to be granted during vacation, and any judge refusing the writ or gaoler delaying to make a return thereto, was subjected to a penalty. In 1816 the Act was extended to persons confined on civil charges. On occasions the Habeas Corpus Act is suspended, but it is usual for Parliament to pass an Act of Indemnity for things done during the suspension.

In 1862 there was passed in consequence of the decision in Anderson's Case (39 L. J. Q. B. 129), an Act providing that no writ of *habeas corpus* shall issue out of England by authority of any judge or court of justice therein, into any colony or foreign dominion of the Crown, where her Majesty has a lawfully established court or courts of justice, having authority to grant and issue the said writ, and to insure the due execution thereof throughout such colony or dominion.

Martial Law.

"When first we hear of martial law in England it is spelt indifferently *marshall* and *martial*, and it is quite clear that the two words were confused in the popular mind—the law administered by the constable and marshall was martial law." (Maitland p. 266.) Queen Elizabeth was particularly partial to martial law, thus we find in her reign (1588) a proclamation that any person importing Papal bulls, &c., is to be proceeded against by martial law, and in 1595 we find her appointing a provost martial "to repair to all common highways near to the city, which any vagrant persons do haunt, and with the assistance of justices and constables, to apprehend all such vagrant and suspected persons, and them to deliver to the said justices, by them to be committed and examined of the causes of their wandering, and finding them notoriously culpable in their unlawful manner of life, as incorrigible, and so certified by the said justices, to cause to be executed upon the gallows or gibbet such of them that are so found most notorious and incorrigible offenders." Five persons were accordingly executed. In James I.'s reign, a commission issue to try soldiers and 'other dissolute persons' for mutinies, robberies and felonies.

As to the nature of martial law, Dicey (at p. 544) draws four conclusions: 1. Martial law cannot exist in time of peace. 2. The existence of martial law does not in any way depend upon the Proclamation of martial law. 3. The Courts have, at any rate in time of peace, jurisdiction in respect of acts which have been done by military authorities and others during a state of war. 4. The protection of military men and others against actions or prosecutions in respect of unlawful acts done during a time of war, *bona fide* and in the service of the country, is an Act of Indemnity. This doctrine Dicey calls the doctrine of immediate necessity, and in its favour he rejects three other doctrines, first, that which bases the use of martial law on the royal prerogative, second, the second basing that use on the immunity of soldiers from liability to proceedings in the civil Courts as contrasted with the military Courts. (See H. Erle Richard's Martial Law, L. Q. R. XVIII. p. 133), and lastly the doctrine of political necessity or expediency. (See Sir Frederick Pollock, L. Q. R. XVIII. 162).

CHAPTER XVII.

The Bill of Rights and the Act of Succession Annotated.

An Act for declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown.

Whereas the lords spiritual and temporal, and commons assembled at Westminster, lawfully, fully, and freely representing all the estates of the people of this realm, did upon the thirteenth day of February, in the year of our Lord one thousand six hundred and eighty-eight, present unto their Majesties, then called and known by the names and style of William and Mary, prince and princess of Orange, being present in their proper persons, a certain declaration in writing, made by the said lords and commons, in the words following, viz.

Whereas the late King James the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the protestant religion, and the laws and liberties of this kingdom.

(1). By assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of parliament.

(2). By committing and prosecuting divers worthy prelates, for humbly petitioning to be excused from concurring to the same assumed power.

(3). By issuing and causing to be executed a commission under the great seal for erecting a court called, The Court of Commissioners for Ecclesiastical Causes.

(*The Court of Commissioners for Ecclesiastical Causes.*

The Court of High Commission was established in the first years of the reign of Elizabeth for the trial of errors, schisms, heresies, abuses, offences, contempts and enormities. It was abolished by the Long Parliament, but was re-established by James II.

(4). By levying money for and to the use of the Crown, by pretence of prerogative, for other time, and in other manner, than the same was granted by parliament.

(5). By raising and keeping a standing army within this kingdom in time of peace, without consent of parliament, and quartering soldiers contrary to law.

(Standing Army.

There cannot be said to have been any standing army in England until the Protectorate, when the Instrument of Government (1653) provided for a regular army of 30,000 men. The tyranny which Cromwell established with this weapon aroused the opposition of the nation and at the Restoration the army was disbanded, but 5,000 men, including the Coldstreams, were retained under the name of Guards. James II. utilised the rebellion of Monmouth to keep on foot an army of 30,000, which he kept in camp at Hounslow in order to overawe London. The declaration pronouncing the illegality of a standing army without the consent of Parliament contained in the Bill of Rights is repeated in the Mutiny Act, which authorises the continuance of an army, and is passed annually and for one year only).

(6). By causing several good subjects, being protestants, to be disarmed, at the same time when papists were both armed and employed, contrary to law.

(7). By violating the freedom of election of members to serve in Parliament.

(Interference with Elections.

The Tudor sovereigns did their best to render the House of Commons subservient by creating new boroughs, and managing elections. James I. in summoning his new Parliament specified the kind of men who were to be elected. The Stuarts did not create many new boroughs, indeed, Charles only created one, but they did forfeit and remodel borough charters so that they might have a court party in the Commons).

(8). By prosecutions in the court of King's Bench, for matters and causes cognizable only in Parliament; and by divers other arbitrary and illegal courses.

(9). And whereas of late years, partial, corrupt, and unqualified persons have been returned and served on juries in trials, and particularly divers jurors in trials for high treason, which were not freeholders.

(10). And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects.

(11). And excessive fines have been imposed; and illegal and cruel punishments inflicted.

(12). And several grants and promises made of fines and forfeitures, before any conviction or judgment against the persons, upon whom the same were to be levied.

All which are utterly and directly contrary to the known laws and statutes, and freedom of this realm.

And whereas the said late King James the Second having abdicated the government, and the throne being thereby vacant, his highness the prince of Orange (whom it hath pleased Almighty God to make the glorious instrument of delivering this kingdom from popery and arbitrary power) did (by the advice of the lords spiritual and temporal, and divers principal persons of the commons) cause letters to be written to the lords spiritual and temporal, being protestants; and other letters to the several counties, cities, universities, boroughs, and cinque-ports, for the choosing of such persons to represent them, as were of right to be sent to parliament, to meet and sit at Westminster upon the two and twentieth day of January, in this year one thousand six hundred eighty and eight, in order to such an establishment, as that their religion, laws, and liberties might not again be in danger of being subverted: upon which letters, elections have been accordingly made.

And thereupon the said lords spiritual and temporal, and commons, pursuant to their respective letters and elections, being now assembled in a full and free representative of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid; do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties, declare;

(The cinque ports are the towns of Hastings, Romney, Hythe, Dover and Sandwich with the 'ancient towns' of Winchelsea and Rye. Up to the time of Henry VII. they practically supplied the whole fleet, and for a long time after a permanent fleet had come into existence, largely defrayed its expenses. In return they received many privileges and exemptions.)

(1). That the pretended power of suspending of laws, or the execution of laws, without consent of parliament, is illegal.

(2). That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.

(3). That the commission for erecting the late court of commissioners for ecclesiastical causes, and all other commissions and courts of like nature are illegal and pernicious.

(4). That levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal.

(5). That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.

(6). That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

(7). That the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law.

(8). That election of members of parliament ought to be free.

(9). That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

(10). That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

(The excessiveness of the bail frequently rendered the Habeas Corpus Act a dead letter.)

(11). That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.

(12). That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void.

(13). And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently.

And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties; and

that no declarations, judgments, doings or proceedings, to the prejudice of the people in any of the said premises, ought in any wise to be drawn hereafter into consequence or example.

To which demand of their rights they are particularly encouraged by the declaration of his highness the prince of Orange, as being the only means for obtaining a full redress and remedy therein.

Having therefore an entire confidence, That his said highness the prince of Orange will perfect the deliverance so far advanced by him, and will still preserve them from the violation of their rights, which they have here asserted, and from all other attempts upon their religion, rights, and liberties.

II. The said lords spiritual and temporal, and commons, assembled at Westminster do resolve, That William and Mary prince and princess of Orange, be, and be declared, King and Queen of England, France and Ireland, and the dominions thereunto belonging, to hold the crown and royal dignity of the said kingdoms and dominions to them the said prince and princess during their lives, and the life of the survivor of them; and that the sole and full exercise of the regal power be only in, and executed by the said prince of Orange, in the names of the said prince and princess, during their joint lives; and after their deceases, the said crown and the royal dignity of the said kingdoms and dominions to be to the heirs of the body of the said princess; and for default of such issue to the princess Anne of Denmark, and the heirs of her body; and for default of such issue to the heirs of the body of the said prince of Orange. And the lords spiritual and temporal, and commons, do pray the said prince and princess to accept the same accordingly.

III. And that the oaths hereafter mentioned be taken by all persons of whom the oaths of allegiance and supremacy might be required by law, instead of them; and that the said oaths of allegiance and supremacy be abrogated.

I A. B. do sincerely promise and swear, That I will be faithful, and bear true allegiance, to their Majesties King William and Queen Mary:

So help me God.

I A. B. do swear, That I do from my heart abhor, detest, and abjure as impious and heretical, that damnable doctrine and position, That princes excommunicated or deprived by the

pope, or any authority of the see of Rome, may be deposed or murdered by their subjects, or any other whatsoever. And I do declare, That no foreign prince, person, prelate, state, or potentate hath, or ought to have any jurisdiction, power, superiority, pre-eminence, or authority ecclesiastical or spiritual, within this realm:

So help me God.

IV. Upon which their said Majesties did accept the crown and royal dignity of the kingdoms of England, France, and Ireland, and the dominions thereunto belonging, according to the resolution and desire of the said lords and commons contained in the said declaration.

V. And thereupon their Majesties were pleased, That the said lords spiritual and temporal, and commons, being the two houses of parliament, should continue to sit, and with their Majesties' royal concurrence make effectual provision for the settlement of religion, laws and liberties of this kingdom, so that the same for the future might not be in danger again of being subverted; to which the said lords spiritual and temporal, and commons, did agree and proceed to act accordingly.

["The Estates of the Realm which deposed Richard were changed into a Parliament of Henry by the transparent fiction of sending out writs, which were not, and could not be, followed by any real elections. The convention which recalled or elected Charles the Second did indeed turn itself into a Parliament, but it was deemed needful that its acts should be confirmed by another Parliament. The Acts of the Convention of 1688 were not deemed to need any such confirmation. Each of these differences marks a stage in the return to the doctrine of common sense, that, convenient as it is in all ordinary times that Parliament should be summoned by the writ of the sovereign, yet it is not from that summons, but from the choice of the people, that Parliament derives its real being and its inherent powers." (Freeman's Growth of the English Constitution, p. 137.)]

VI. Now in pursuance of the premises, the said lords spiritual and temporal, and commons, in parliament assembled, for the ratifying, confirming, and establishing the said declaration, and the articles, clauses, matters, and things therein contained, by the force of a law made in due form by authority of parlia-

ment, do pray that it may be declared and enacted, That all and singular the rights asserted and claimed in the said declaration, are the true, ancient, and indubitable rights and liberties of the people of this kingdom, and so shall be esteemed, allowed, adjudged, deemed, and taken to be, and that all and every the particulars aforesaid shall be firmly and strictly holden and observed, as they are expressed in the said declaration; and all officers and ministers whatsoever shall serve their Majesties and their successors according to the same in all times to come.

VII. And the said lords spiritual and temporal, and commons, seriously considering how it hath pleased Almighty God, in his marvellous providence, and merciful goodness to this nation, to provide and preserve their said Majesties' royal persons most happily to reign over us upon the throne of their ancestors, for which they render unto him from the bottom of their hearts their humblest thanks and praises, do truly, firmly, assuredly, and in the sincerity of their hearts think, and do hereby recognize, acknowledge and declare, That King James the Second, having abdicated the government, and their Majesties having accepted the crown and royal dignity as aforesaid, their said Majesties did become, were, are, and of right ought to be, by the laws of this realm, our sovereign liege lord and lady, King and Queen of England, France, and Ireland, and the dominions thereunto belonging, in and to whose princely persons the royal state, crown, and dignity of the said realms, with all honours, stiles, titles, regalities, prerogatives, powers, jurisdictions and authorities to the same belonging and appertaining, are most fully, rightfully, and intirely invested and incorporated, united and annexed.

VIII. And for preventing all questions and divisions in this realm, by reason of any pretended titles to the crown, and for preserving a certainty in the succession thereof, in and upon which the unity, peace, tranquility, and safety of this nation doth, under God, wholly consist and depend, The said lords spiritual and temporal, and commons, do beseech their Majesties that it may be enacted, established, and declared, That the crown and regal government of the said kingdoms and dominions, with all and singular the premises thereunto belonging and appertaining, shall be and continue to their said Majesties, and the survivor of them, during their lives, and the life of the survivor of them; And that the intire, perfect, and full exercise

of the regal power and government be only in, and executed by his Majesty, in the names of both their Majesties during their joint lives; and after their deceases the said crown and premises shall be and remain to the heirs of the body of her Majesty; and for default of such issue, to her royal highness the princess Anne of Denmark, and the heirs of her body; and for default of such issue, to the heirs of the body of his said Majesty; and thereunto the said lords spiritual and temporal, and commons, do, in the name of all the people aforesaid, most humbly and faithfully submit themselves, their heirs and posterities forever; and do faithfully promise, That they will stand to, maintain, and defend their said Majesties, and also the limitation and succession of the crown herein specified and contained, to the utmost of their powers, with their lives and estates, against all persons whatsoever, that shall attempt anything to the contrary.

IX. And whereas it hath been found by experience, that it is inconsistent with the safety and welfare of this protestant kingdom, to be governed by a popish prince, or by any King or Queen marrying a papist; the said lords spiritual and temporal, and commons, do further pray that it may be enacted, That all and every person and persons that is, are or shall be reconciled to, or shall hold communion with, the see or church of Rome, or shall profess the popish religion, or shall marry a papist, shall be excluded, and be for ever incapable to inherit, possess, or enjoy the crown and government of this realm, and Ireland, and the dominions thereunto belonging, or any part of the same, or to have, use, or exercise any regal power, authority, or jurisdiction within the same; and in all and every such case or cases the people of these realms shall be, and are hereby absolved of their allegiance; and the said crown and government shall from time to time descend to, and be enjoyed by such person or persons, being protestants, as should have inherited and enjoyed the same, in case the said person or persons so reconciled, holding communion, or professing, or marrying as aforesaid, were naturally dead.

X. And that every King and Queen of this realm, who at any time hereafter shall come to and succeed in the imperial crown of this kingdom, shall on the first day of the meeting of the first parliament, next after his or her coming to the crown, sitting in his or her throne in the house of peers, in the

presence of the lords and commons therein assembled, or at his or her coronation, before such person or persons who shall administer the coronation oath to him or her, at the time of his or her taking the said oath (which shall first happen) make, subscribe, and audibly repeat the declaration mentioned in the statute made in the thirtieth year of the reign of King Charles the Second, intituled, an Act for the more effectual preserving the King's person and government, by disabling papists from sitting in either house of parliament. But if it shall happen, that such King or Queen, upon his or her succession to the crown of this realm, shall be under the age of twelve years, then every such King or Queen shall make, subscribe, and audibly repeat the said declaration at his or her coronation, or the first day of the meeting of the first parliament as aforesaid, which shall first happen after such King or Queen shall have attained the said age of twelve years.

(The declaration mentioned in this section is a declaration against the doctrine of transubstantiation.)

(The coronation oath at the coronation of Edward VII. was as follows:—

Will you solemnly promise and swear to govern the people of this United Kingdom of Great Britain and Ireland, and the Dominions thereto belonging, according to the Statutes in Parliament agreed on, and the respective laws and customs of the same?

I solemnly promise so to do.

Will you to your power cause Law and Justice in mercy to be executed in all your judgments?

I will.

Will you to the utmost of your power, maintain the Laws of God, the true profession of the Gospel, and the Protestant reformed religion established by law? And will you maintain and preserve inviolably the Settlement of the Church of England, and the doctrine, worship, discipline and government thereof, as by law established in England? And will you preserve unto the Bishops and Clergy of England, and to the Church there committed to their charge, all such rights and privileges, as by law do or shall appertain to them or any of them?

All this I promise to do).

XI. All which their Majesties are contented and pleased shall be declared, enacted, and established by authority of this present parliament, and shall stand, remain, and be the law of this realm for ever; and the same are by their said Majesties, by and with the advice and consent of the lords spiritual, and commons, in parliament assembled, and by the authority of the same, declared, enacted, and established accordingly.

XII. And be it further declared and enacted by the authority aforesaid, That from and after this present session of parliament, no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void, and of no effect, except a dispensation be allowed of in such statute, and except in such cases as shall be specially provided for by one or more bill or bills to be passed during this present session of parliament.

The Dispensing Power and Legislation by Proclamation.

The right to dispense with laws was a remnant of the right to legislate by proclamation, a right which prior to the formation of a Parliament, as we know it to-day, the King in Council had frequently exercised as distinct from statute. These Ordinances were usually, though not always, of a temporary nature. Indeed even after the institution of a regular Parliament, the Lords and Commons suggested that the sumptuary laws of 1363 should be enacted by Ordinance rather than by Statute, but in 1353 the Commons objected to the Ordinances of the Staple, which prohibited English merchants from exporting wool under pain of death, and petitioned that they might be entered upon the Parliament Roll. These Ordinances largely disappeared during the fifteenth century, but reappear in the sixteenth under the form of Royal Proclamations. The Tudor monarchs made considerable use of them, and enforced them by means of the Court of Star Chamber, rather than in the ordinary courts of the land. Indeed in 1539, Henry VIII. managed to extract from Parliament legislation giving Proclamations the force of statutes, but this legislation was repealed at the beginning of the next reign. The Tudors and James I. however continued to legislate by proclamation until the matter was brought to an issue when James I. issued proclamations forbidding the increase of buildings about London and the making of starch out of wheat (1610). The question was referred to Coke and three other judges, who expressed the following

opinion: (1). The King by his proclamation cannot create any offence which was not one before: for then he might alter the law of the land in a high point; for if he may create an offence where none is, upon that issues fine and imprisonment. (2). The King hath no prerogative but what the law of the land allows him. (3). But the King, for the prevention of offences, may by proclamation admonish his subjects that they keep the laws and do not offend them, upon punishment to be inflicted by law: the neglect of such proclamation aggravates the offence. (4). If an offence be not punishable in the Star Chamber, the prohibition of it by proclamation cannot make it so.

For some time after this declaration no proclamation imposing fine and imprisonment was issued, but during the reign of Charles I. many oppressive royal proclamations were issued and upheld through the servility of the judges. The abolition of the Star Chamber by the Long Parliament removed the machinery by which proclamations were rendered effective. Anson notes an episode of the eighteenth century, as furnishing an excellent illustration of the difference between legal and illegal proclamations. In 1766, during times of scarcity induced by a bad harvest, the Crown on the advice of its ministers issued two proclamations, one proclaiming penalties against regraters (or persons who buy up food to hold for a better price or to carry it to another part of the country to get a better price). In this case there were statutes against regrating and so the proclamation was lawful. The second proclamation laid an embargo on all ships laden with wheat or wheat flour. By statute, however, the export of corn was free. The ministers did not attempt to defend this second proclamation as being legal, but claimed that it was warranted by the emergency and procured an Act of Indemnity both for themselves and for the officials who had carried out the embargo.

Dispensing Power.

Collateral with the question of the legislative effect of a proclamation is the question whether laws can be dispensed with by the Crown. There seems to be no doubt that in the middle ages dispensations from the observance of statutes were given and pardons granted before indictment.

In the reign of Richard II. it was held by the Courts that the King could not dispense with the laws relating to *mala in se*,

nor those relating to the rights of individuals and corporations, but could do so in the case of *mala prohibita* (offences created by statute). The dispensing power was generally effected by a *non obstante* clause, a procedure copied from the Papacy which was in the habit of issuing bulls, "*non obstante,* any law to the contrary."

A constant struggle, says Taswell Langmead, respecting the exercise of this prerogative seems to have been maintained for centuries between the Crown and the upholders of constitutional freedom, in which sometimes one side prevailed and sometimes the other.

In the case of *Thomas* v. *Sorrell,* Vaughan, J., rejected the distinction between *mala prohibita* and *mala in se,* and gave expression to opinions tending to show that the King might dispense with the breach of a statute where no private right was injured, or with the continuous breach of a penal statute enacted for the exclusive benefit of the Crown.

Sir E. Hales accepted a military office; though being a Roman Catholic, he had not taken the oaths of supremacy and allegiance and received the sacrament according to the rights of the Church of England as required by the Test Act. To test the question a collusive action was brought to recover the statutory penalty, and the day before the indictment Sir E. Hales received letters patent under the great seal dispensing with the statute in his case. A subservient Court pronounced in the favour of the dispensing power.

The Bill of Rights recites that "King James II., by the advice of diverse evill counsellors, judges and ministers imployed by him, did endeavour to subvert and extorpate the Protestant religion, and the lawes and liberties of this kingdome," and then declares that "the pretended power of dispensing with laws, or the execution of laws, by regall authoritie, as it hath beene assumed and exercised of late, is illegal." The Bill (s. 12) declared and enacted, "That from and after this present session of Parlyament noe dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of noe effect, except a dispensation be allowed of in such statute."

Suspending Power.

The Suspending Power was a power which was not claimed earnestly by any king except James II., who by his Declaration

of Indulgence 1687, suspended the execution of "all and all manner of penal laws in matters ecclesiastical." The Declaration involving as it did the petition of the seven bishops against being asked to declare and distribute it and their subsequent trial and acquittal for an alleged libel contained in their petition, was the direct cause of the downfall of the Stuart Dynasty. The Bill of Rights declared that "the pretended power of suspending of laws, or the execution of laws, by regall authority, with consent of Parlyament, is illegal.")

XIII. Provided that no charter, or grant, or pardon, granted before the three and twentieth day of October, in the year of our Lord one thousand six hundred eighty nine, shall be any ways impeached or invalidated by this Act, but that the same shall be and remain of the same force and effect in law, and no other than as if this said Act had never been made.

THE ACT OF SETTLEMENT.

Whereas in the first year of the reign of Your Majesty and of our late most gracious sovereign lady queen Mary (of blessed memory) an Act of parliament was made, entitled, An Act for declaring the Rights and Liberties of the Subject and for settling the Succession of the Crown, wherein it was (amongst other things) enacted, established and declared, that the crown and regal government of the kingdoms of England, France and Ireland, and the dominions thereunto belonging, should be and continue to Your Majesty and the said late queen during the joint lives of Your Majesty and the said queen and to the survivor; and that after the decease of Your Majesty and of the said queen, the said crown and regal government should be and remain to the heirs of the body of the said late queen; and for default of such issue to Her Royal Highness the princess Anne of Denmark and the heirs of her body; and for default of such issue to the heirs of the body of Your Majesty. And it was thereby further enacted, that all and every person and persons that then were or afterwards should be reconciled to or should hold communion with the See or Church of Rome, or should profess the popish religion, or marry a papist, should be excluded, and are by that Act made forever incapable to inherit, possess or enjoy the crown and government of this realm and Ireland and the Dominions thereunto belonging or any part of the same, or to have, use or exercise any regal

power, authority or jurisdiction within the same; and in all and every such case and cases the people of these realms shall be and are thereby absolved of their allegiance; and that the said crown and government shall from time to time descend to and be enjoyed by such person or persons, being Protestants, as should have inherited and enjoyed the same, in case the said person or persons so reconciled, holding communion, professing or marrying as aforesaid were naturally dead. After the making of which statute and the settlement therein contained, Your Majesty's good subjects, who were restored to the full and free possession and enjoyment of their religion, rights and liberties, by the Providence of God giving success to Your Majesty's just undertakings and unwearied endeavours for that purpose, had no greater temporal felicity to hope or wish for, than to see a royal progeny descending from Your Majesty, to whom (under God) they owe their tranquility, and whose ancestors have for many years been principal assertors of the reformed religion and the liberties of Europe and from our said most gracious sovereign lady, whose memory will always be precious to the subjects of these realms; and it having since pleased Almighty God to take away our said sovereign lady, and also the most hopeful prince William, duke of Gloucester (the only surviving issue of Her Royal Highness the princess Anne of Denmark), to the unspeakable grief and sorrow of Your Majesty and your said good subjects, who, under such losses being sensibly put in mind, that it standeth wholly in the pleasure of Almighty God to prolong the lives of Your Majesty and of Her Royal Highness, and to grant to Your Majesty or to Her Royal Highness such issue as may be inheritable to the crown and regal government aforesaid, by the respective limitations in the said recited Act contained, do constantly implore the divine mercy for those blessings; and Your Majesty's said subjects having daily experience of your royal care and concern for the present and future welfare of these kingdoms, and particularly recommending from your throne a further provision to be made for the succession of the crown in the Protestant line, for the happiness of the nation and the security of our religion; and it being absolutely necessary for the safety, peace and quiet of this realm, to obviate all doubts and contentions in the same, by reason of any pretended title to the

crown and to maintain a certainty in the succession thereof, to which your subjects may safely have recourse for their protection, in case the limitations in the said just recited Act should determine: Therefore for a further provision of the succession of the crown in the Protestant line, we Your Majesty's most dutiful and loyal subjects, the lords spiritual and temporal and commons in this present parliament assembled, do beseech Your Majesty that it may be enacted and declared, and be it enacted and declared by the king's most excellent Majesty by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by the authority of the same, that the most excellent princess, Sophia, electress and duchess dowager of Hanover, daughter of the most excellent princess Elizabeth, late queen of Bohemia, daughter of our late sovereign lord king James the First, of happy memory, be and is hereby declared to be the next in succession in the Protestant line to the imperial crown and dignity of the said realms of England, France and Ireland with the dominions and territories thereunto belonging, after His Majesty and the princess Anne of Denmark, and in default of issue of the said princess Anne and of His Majesty respectively: and that from and after the deceases of His said Majesty our now sovereign lord and of Her Royal Highness the princess Anne of Denmark, and for default of issue of the said princess Anne and of his Majesty respectively, the crown and regal government of the said kingdoms of England, France and Ireland and of the dominions thereunto belonging, with royal state and dignity of the said realms and all honours, styles, titles, regalities, prerogatives, powers, jurisdictions and authorities to the same belonging and appertaining, shall be, remain and continue to the said most excellent princess Sophia and the heirs of her body, being Protestants; and thereunto the said lords spiritual and temporal and commons shall and will in the name of all the people of this realm, most humbly and faithfully submit themselves, their heirs and posterities, and do faithfully promise that after the deceases of His Majesty and Her Royal Highness, and the failure of the heirs of their respective bodies, to stand to, maintain and defend the said princess Sophia and the heirs of her body, being Protestant according to the limitation and succession of the crown in this Act specified and contained, to the utmost of their powers,

with their lives and estates, against all persons whatsoever that shall attempt anything to the contrary.

II. Provided always, and it is hereby enacted, that all and every person and persons, who shall or may take or inherit the said crown, by virtue of the limitation of this present Act and is, are or shall be reconciled to or shall hold communion with the See or Church of Rome, or shall profess the popish religion, or shall marry a papist, shall be subject to such incapacities, as in such case or cases are by the said recited Act provided, enacted and established; and that every king and queen of this realm who shall come to and succeed in the imperial crown of this kingdom by virtue of this Act, shall have the coronation oath administered to him, her or them at their respective coronation, according to the Act of Parliament made in the first year of the reign of His Majesty and the said late queen Mary, entitled, An Act for establishing the Coronation Oath, and shall make, subscribe and repeat the declaration in the Act first above recited, mentioned or referred to, in the manner and form thereby prescribed.

III. And whereas it is requisite and necessary that some further provision be made for securing our religion, laws and liberties, from and after the death of His Majesty and the princess Anne of Denmark, and in default of issue of the body of the said princess and of His Majesty respectively; be it enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons in parliament assembled, and by authority of the same:

(1) That whosoever shall hereafter come to the possession of this crown shall join in communion with the Church of England as by law established.

(2) That in case the crown and imperial dignity of this realm shall hereafter come to any person, not being a native of this kingdom of England, this nation be not obliged to engage in any war for the defence of any dominions or territories which do not belong to the crown of England, without consent of parliament.

(3) That no person who shall hereafter come to the possession of this crown shall go out of the dominions of England, Scotland or Ireland, without consent of Parliament.

(4) That from and after the time that the further limitations by this Act shall take effect, all matters and things relating to the well governing of this kingdom, which are properly cognizable in the privy council by the laws and customs of this realm, shall be transacted there; and all resolutions taken thereupon shall be signed by such of the privy council as shall advise and consent to the same.

(5) That after the said limitation shall take effect as aforesaid, no person born out of the kingdoms of England, Scotland or Ireland or the dominions thereunto belonging (although he be naturalized or made a denizen, except such as are born of English parents) shall be capable to be of the privy council, or a member of either house of parliament, or to enjoy any office or place of trust, either civil or military, or to have any grant of lands, tenements or hereditaments from the crown to himself or to any other or others in trust for him.

(6) That no person who has an office or place of profit under the king or receives a pension from the crown shall be capable of serving as a member of the house of commons.

(7) That after the said limitations shall take effect as aforesaid, judges' commissions be made *quam diu se bene gesserint,* and their salaries ascertained and established, but upon the address of both houses of parliament it may be lawful to remove them.

(8) That no pardon under the great seal of England be pleadable to an impeachment by the commons in parliament.

IV. And whereas the laws of England are the birthright of the people thereof, and all the kings and queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws, and all their officers and ministers ought to serve them respectively according to the same; the said lords spiritual and temporal and commons do therefore further humbly pray, that all the laws and statutes of this realm for securing the established religion and the rights and liberties of the people thereof, and all other laws and statutes of the same now in force, may be ratified and confirmed, and the same are by His Majesty by and with the advice and consent of the said lords spiritual and temporal and

commons, and by authority of the same, ratified and confirmed accordingly.

(It should be noted that III. (4) and (6) were repealed by 4 & 5 Anne c. 20, ss. 27 & 28. Maitland, at p. 368 of his Constitutional History points out how different would have been the history of Parliament had III. (6) become a permanent part of the law of the land. The modern English ministerial system would have been impossible, and the House of Lords, to which the King would have called his ministers, would have become far more important than the House of Commons. Clause III. (4) was due to the fact that Parliament, even at the date of the Act of Settlement, had not the conception that it was the ruler of the country; it had no objection to the King ruling with the advice of ministers, who would openly avow that advice, but objected strongly to secret councils or cabals of ministers who shrank from putting their names to their advice).

CHAPTER XVIII.

The B. N. A. Act Annotated.

THE BRITISH NORTH AMERICA ACT, 1867.

An Act for the Union of Canada, Nova Scotia and New Brunswick, and the Government thereof, and for purposes connected therewith.

[29th March, 1867.]

WHEREAS the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament, it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:

Be it therefore enacted and declared by the Queen's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I.—PRELIMINARY.

1. This Act may be cited as the British North America Act, 1867.

2. The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

II.—UNION.

3. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after a Day therein appointed, not being more than Six Months after the passing of this Act, the Provinces of Canada, Nova Scotia and New Brunswick shall form and be One Dominion under the name of Canada; and on and after that Day those Three Provinces shall form and be One Dominion under that Name accordingly.

4. The subsequent Provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say, on and after the Day appointed for the Union taking effect in the Queen's Proclamation; and in the same Provisions, unless it is otherwise expressed or implied, the Name Canada shall be taken to mean Canada as constituted under this Act.

5. Canada shall be divided into Four Provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick.

6. The Parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of Upper Canada and Lower Canada, shall be deemed to be severed, and shall form Two Separate Provinces. The Part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario; and the Part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec.

7. The Provinces of Nova Scotia and New Brunswick shall have the same Limits as at the passing of this Act.

8. In the general Census of the Population of Canada which is hereby required to be taken in the year One thousand eight hundred and seventy-one, and in every Tenth year thereafter, the respective Populations of the Four Provinces shall be distinguished.

III.—EXECUTIVE POWER.

9. The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

(Compare s. 61 of The Australian Commonwealth Act which subject to the declaration of the discretionary right of delegation by the Sovereign in s. 2, provides that the executive power

though declared to be in the Sovereign is yet to be exercisable of the Governor-General. See also ss. 14, 15, 16, which in the words of Lord Haldane, appear to negative the theory that the Governor-General is made a viceroy).

10. The Provisions of this Act referring to the Governor-General extend and apply to the Governor-General for the Time being of Canada, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of Canada on behalf and in the name of the Queen, by whatever title he is designated.

11. There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor-General and sworn in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor-General.

(See chapter on Privy Council).

12. All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia or New Brunswick, are at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of those Provinces, with the Advice, or with the Advice and Consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any number of Members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union, in relation to the Government of Canada, be vested in and exercisable by the Governor-General, with the Advice or with the Advice and Consent of or in conjunction with the Queen's Privy Council for Canada or any members thereof, or by the Governor-General individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada (see sec. 65).

13. The Provisions of the Act referring to the Governor-General in Council shall be construed as referring to the

Governor-General acting by and with the Advice of the Queen's Privy Council for Canada.

14. It shall be lawful for the Queen, if Her Majesty thinks fit, to authorize the Governor-General from Time to Time to appoint any Person or any Persons jointly or severally to be his Deputy or Deputies within any Part or Parts of Canada, and in that Capacity to exercise during the Pleasure of the Governor-General such of the Powers, Authorities and Functions of the Governor-General as the Governor-General deems it necessary or expedient to assign to him or them, Subject to any Limitations or Directions expressed or given by the Queen; but the Appointment of such a Deputy or Deputies shall not affect the Exercise by the Governor-General himself of any Power, Authority, or Function.

15. The Commander-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.

(See The Bills of Rights, as to the right to maintain a standing army, and note that before the Revolution, the Crown was commander of (1) the old feudal levies or array arising out of the military tenures, and of (2) the train bands, sprung from the Anglo-Saxon fyrd or National Militia, which, however, did not receive the name of 'militia' until the time of Charles I., and note that the necessity of providing for an army and its pay is one of the chief means by which annual parliaments are ensured in England; cf. s. 20 of this Act).

16. Until the Queen otherwise directs, the Seat of Government of Canada shall be Ottawa.

IV.—LEGISLATIVE POWER.

17. There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

18. The Privileges, Immunities, and Powers to be held, enjoyed and exercised by the Senate and by the House of Commons, and by the Members thereof respectively, shall be such as are from Time to Time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the Members thereof.

(Note that the legislative assemblies of the Provinces are not thus limited, but excessive legislation in this direction is sufficiently guarded against by the existence of the veto power in the Dominion Government.) For substituted section, see 38 & 39 Vict. c. 38, *infra*.

19. The Parliament of Canada shall be called together not later than Six months after the Union.

20. There shall be a Session of the Parliament of Canada once at least in every Year, so that Twelve months shall not intervene between the last Sitting of the Parliament in one Session and its first Sitting in the next Session.

(The date of the sitting is taken as that fixed for the return of the writs, not of the actual return).

The Senate.

21. The Senate shall, subject to the Provisions of this Act, consist of Seventy-two Members, who shall be styled Senators.

(See 34 & 35 Vict. c. 28, s. 2, and 49 & 50 Vict. c. 35, s. 1, *infra*).

22. In relation to the Constitution of the Senate, Canada shall be deemed to consist of Three Divisions:—

(1). Ontario;

(2). Quebec;

(3). The Maritime Provinces: Nova Scotia and New Brunswick; which Three Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows: Ontario by Twenty-four Senators; Quebec by Twenty-four Senators; and the Maritime Provinces by Twenty-four Senators, Twelve thereof representing Nova Scotia and Twelve thereof representing New Brunswick.

In the case of Quebec, each of the Twenty-four Senators representing that Province shall be appointed for one of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A, to Chapter One of Consolidated Statutes of Canada.

23. The Qualifications of a Senator shall be as follows:—

(1). He shall be of the full Age of Thirty years.

(2). He shall be either a Natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and

Ireland, or of the Legislature of one of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union.

(3). He shall be legally or equitably seized as of Freehold for his own Use and Benefit of Lands or Tenements held in free and Common Soccage, or seized or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture, within the Province for which he is appointed, of the value of Four Thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages and Incumbrances due or payable out of, or charged on or affecting the same;

(4). His Real and Personal Property shall be together worth Four Thousand Dollars over and above his Debts and Liabilities;

(5). He shall be resident in the Province for which he is appointed;

(6). In the Case of Quebec, he shall have his Real Property qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

24. The Governor-General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified persons to the Senate; and, subject to the Provisions of this Act, every person so summoned shall become and be a Member of the Senate and a Senator (see sec. 127).

25. Such persons shall be first summoned to the Senate as the Queen by Warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their names shall be inserted in the Queen's Proclamation of Union.

26. If at any Time, on the Recommendation of the Governor-General, the Queen thinks fit to direct that Three or Six Members be added to the Senate, the Governor-General may, by Summons to Three or Six Qualified Persons (as the case may be), representing equally the Three Divisions of Canada, add to the Senate accordingly.

27. In case of such Addition being at any Time made, the Governor-General shall not summon any Person to the Senate, except on a further like Direction by the Queen on the like

Recommendation, until each of the Three Divisions of Canada is represented by Twenty-four Senators, and no more.

(It should be noticed that there does not seem to be much room for composing differences between the Senate and the House of Commons by the threat of creating new Senators, as is the practice in case of vital differences of opinion between the Houses of Lords and Commons. This provision has never been utilized. During Mr. Mackenzie's administration an application was made that appointments should be made. The application was courteously refused, with an intimation that the power was one which was only intended to be used on a very extraordinary occasion, when parties were nearly equal, with the object of bringing about a settlement of some very important question).

28. The Number of Senators shall not at any time exceed Seventy-Eight.

29. A Senator shall, subject to the Provisions of this Act, hold his place in the Senate for life.

30. A Senator may, by writing under his hand, addressed to the Governor-General, resign his place in the Senate, and thereupon the same shall be vacant.

(Note that it is impossible for the successor to a Peerage in the United Kingdom to waive his right to sit in the House of Lords, and to continue to sit in House of Commons. See case of Lord Wolmer on succeeding to the Earldom of Selborne in 1895).

31. The place of a Senator shall become vacant in any of the following cases:—

(1). If for two Consecutive Sessions of the Parliament he fails to give his Attendance in the Senate;

(2). If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience or Adherence to a Foreign Power, or does an act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen of a Foreign Power;

(3). If he is adjudged Bankrupt or Insolvent, or applies for the benefit of any Law relating to Insolvent debtors, or becomes a public defaulter;

(4). If he is attainted of Treason, or convicted of Felony or of any infamous Crime:

(5). If he ceases to be qualified in respect of Property or of Residence; provided that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of Government of Canada while holding an Office under that Government requiring his Presence there.

(See section 39 of this Act).

32. When a vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor-General shall, by Summons to a fit and qualified Person, fill the Vacancy.

33. If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate, the same shall be heard and determined by the Senate.

34. The Governor-General may from Time to Time, by Instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his stead.

35. Until the Parliament of Canada otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the exercise of its Powers.

36. Questions arising in the Senate shall be decided by a majority of Voices, and the Speaker shall in all Cases have a vote, and when the Voices are equal the Decision shall be deemed to be in the Negative.

The House of Commons.

37. The House of Commons shall, subject to the Provisions of this Act, consist of One hundred and eighty-one Members, of whom Eighty-two shall be elected for Ontario, Sixty-five for Quebec, Nineteen for Nova Scotia, and Fifteen for New Brunswick.

38. The Governor-General shall from Time to Time, in the Queen's name, by Instrument under the Great Seal of Canada, summon and call together the House of Commons.

39. A Senator shall not be capable of being elected, or of sitting or voting as a member of the House of Commons.

(See note to sec. 30).

40. Until the Parliament of Canada otherwise provides, Ontario, Quebec, Nova Scotia and New Brunswick shall, for the Purposes of the Election of Members to serve in the House of Commons, be divided into Electoral Districts as follows:—

I.—ONTARIO.

Ontario shall be divided into the Counties, Ridings of Counties, Cities, Parts of Cities, and Towns enumerated in the First Schedule to this Act, each whereof shall be an Electoral District, each such District as numbered in that Schedule being entitled to return One Member.

II.—QUEBEC.

Quebec shall be divided into Sixty-five Electoral Districts, composed of the Sixty-five Electoral Divisions into which Lower Canada is at the passing of this Act divided under Chapter Two of the Consolidated Statutes of Canada, Chapter Seventy-five of the Consolidated Statutes for Lower Canada, and the Act of the Province of Canada of the Twenty-third year of the Queen, Chapter One, or any other Act amending the same in force at the Union, so that each such Electoral Division shall be for the Purposes of this Act an Electoral District entitled to return One Member.

III.—NOVA SCOTIA.

Each of the Eighteen Counties of Nova Scotia shall be an Electoral District. The County of Halifax shall be entitled to return Two Members, and each of the other Counties One Member.

IV.—NEW BRUNSWICK.

Each of the Fourteen Counties into which New Brunswick is divided, including the City and County of St. John, shall be an Electoral District. The City of St. John shall also be a separate Electoral District. Each of those Fifteen Electoral Districts shall be entitled to return One Member.

41. Until the Parliament of Canada otherwise provides, all Laws in force in the several Provinces at the Union relative to the following Matters or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections of such

Members, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which Elections may be continued, the Trial of Controverted Elections and Proceedings incident thereto, the vacating of Seats of Members, and the Execution of new Writs, in case of Seats vacated otherwise than by Dissolution,—shall respectively apply to Elections of Members to serve in the House of Commons for the same several Provinces.

Provided that, until the Parliament of Canada otherwise provides, at any Election for a Member of the House of Commons for the District of Algoma, in addition to Persons qualified by the Law of the Province of Canada to Vote, every male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote.

42. For the First Election of Members to serve in the House of Commons, the Governor-General shall cause Writs to be issued by such Person, in such Form and addressed to such Returning Officers as he thinks fit.

The Person issuing Writs under this Section shall have the like Powers as are possessed at the Union by the Officers charged with the issuing of Writs for the Election of Members to serve in the respective House of Assembly or Legislative Assembly of the Province of Canada, Nova Scotia or New Brunswick; and the Returning Officers to whom Writs are directed under this Section shall have the like Powers as are possessed at the Union by the Officers charged with the returning of Writs for the Election of Members to serve in the same respective House of Assembly or Legislative Assembly.

43. In case a vacancy in the Representation in the House of Commons of any Electoral District happens before the Meeting of the Parliament, or after the Meeting of the Parliament before Provision is made by the Parliament in this behalf, the Provisions of the last foregoing Section of this Act shall extend and apply to the issuing and returning of a Writ in respect of such vacant District.

44. The House of Commons, on its first assembling after a general Election, shall proceed with all practicable speed to elect One of its Members to be Speaker.

45. In case of a Vacancy happening in the Office of Speaker, by Death, Resignation or otherwise, the House of Commons

shall, with all practicable speed, proceed to elect another of its Members to be Speaker.

(The Speaker is not, as in England, re-elected as a matter of course. A seat in the English parliament cannot be resigned. It is vacated by application for a nominal office under the Crown, either the Stewardship of the Chiltern Hundreds or that of the Manor of Northstead. Provision is generally made in Canada for resignation of the membership of lawmaking bodies by writing or oral announcement from his seat by the member intending to resign.

46. The Speaker shall preside at all meetings of the House of Commons.

47. Until the Parliament of Canada otherwise provides, in case of the Absence, for any Reason, of the Speaker from the Chair of the House of Commons for a period of Forty-eight Consecutive Hours, the House may elect another of its Members to act as Speaker, and the Member so elected shall, during the Continuance of such Absence of the Speaker, have and execute all the Powers, Privileges and Duties of Speaker.

48. The Presence of at least Twenty Members of the House of Commons shall be necessary to constitute a Meeting of the House for the Exercise of its Powers; and for that Purpose the Speaker shall be reckoned as a Member.

49. Questions arising in the House of Commons shall be decided by a Majority of Voices other than that of the Speaker, and when the Voices are equal, but not otherwise, the Speaker shall have a Vote.

50. Every House of Commons shall continue for Five Years from the day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor-General), and no longer.

51. On the completion of the Census in the Year one thousand eight hundred and seventy-one, and of each subsequent decennial Census, the Representation of the Four Provinces shall be readjusted by such Authority, in such a manner, and from such time as the Parliament of Canada from Time to Time provides, subject and according to the following Rules:—

(1). Quebec shall have the fixed Number of Sixty-five Members;

(2). There shall be assigned to each of the other Provinces such a number of Members as will bear the same Proportion to the Number of its Population (ascertained at such Census) as the Number Sixty-five bears to the Number of the Population of Quebec (so ascertained);

(3). In the Computation of the Number of Members for a Province, a fractional Part not exceeding One-half of the whole number requisite for entitling the Province to a Member shall be disregarded; but a fractional Part exceeding One-half of that number shall be equivalent to the whole number.

(4). On any such Readjustment the Number of Members for a Province shall not be reduced unless the Proportion which the number of the Population of the Province bore to the Number of the aggregate population of Canada at the then last preceding Readjustment of the Number of Members for the Province is ascertained at the then latest Census to be diminished by One-twentieth Part or upwards;

(5). Such Readjustment shall not take effect until the Termination of the then existing Parliament.

52. The Number of Members of the House of Commons may be from Time to Time increased by the Parliament of Canada, provided the proportionate Representation of the Provinces prescribed by this Act is not thereby disturbed.

Money Votes; Royal Assent.

53. Bills for appropriating any part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any purpose, that has not been first recommended to that House by Message of the Governor-General in the Session in which such Vote, Resolution, Address, or Bill is proposed. (A committee of the Senate reported in 1918 that the Senate has the power to amend money bills, but has not the right to increase the same without the consent of the Crown).

55. Where a Bill passed by the Houses of Parliament is presented to the Governor-General for the Queen's Assent, he shall declare, according to his discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.

56. Where the Governor-General assents to a Bill in the Queen's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to One of Her Majesty's Principal Secretaries of State, and if the Queen in Council within Two Years after receipt thereof by the Secretary of State thinks fit to disallow the Act, such Disallowance (with a certificate of the Secretary of State of the Day on which the Act was received by him) being signified by the Governor-General, by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the Day of such Signification.

57. A bill reserved for the Signification of the Queen's Pleasure shall not have any Force unless and until within Two Years from the day on which it was presented to the Governor-General for the Queen's Assent, the Governor-General signifies, by Speech or Message to each of the Houses of the Parliament or by Proclamation, that it has received the assent of the Queen in Council.

An Entry of every such Speech, Message, or Proclamation shall be made in the Journal of each House, and a Duplicate thereof duly attested shall be delivered to the proper officer to be kept among the Records of Canada.

(See note to sec. 90).

V.—Provincial Constitutions.

Executive Power.

58. For each Province there shall be an Officer, styled the Lieutenant-Governor, appointed by the Governor-General in Council by Instrument under the Great Seal of Canada.

59. A Lieutenant-Governor shall hold Office during the Pleasure of the Governor-General; but any Lieutenant-Governor appointed after the commencement of the First Session of the Parliament of Canada shall not be removable within Five Years

from his Appointment, except for cause assigned, which shall be communicated to him in Writing within One Month after the Order for his Removal is made, and shall be communicated by Message to the Senate and to the House of Commons within One Week thereafter if the Parliament is then sitting, and if not then, within One Week after the Commencement of the next Session of the Parliament.

60. The Salaries of the Lieutenant-Governors shall be fixed and provided by the Parliament of Canada.

61. Every Lieutenant-Governor shall, before assuming the Duties of his office, make and subscribe before the Governor-General or some Person authorized by him, Oaths of Allegiance and Office similar to those taken by the Governor-General.

62. The Provisions of this Act referring to the Lieutenant-Governor extend and apply to the Lieutenant-Governor for the Time being of each Province or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of the Province, by whatever Title he is designated.

63. The Executive Council of Ontario and Quebec shall be composed of such Persons as the Lieutenant-Governor from Time to Time thinks fit, and in the first instance of the following Officers, namely, the Attorney-General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, within Quebec, the Speaker of the Legislative Council and the Solicitor-General.

64. The Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as its exists at the Union, until altered under the Authority of this Act.

65. All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of those Provinces, with the Advice, or with the Advice and Consent, of the respective Executive Councils thereof, or in conjunction with those Councils or with any Number of Members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same are capable of being exercised after the

Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant-Governor of Ontario and Quebec respectively, with the Advice, or with the Advice and consent of, or in conjunction with the respective Executive Councils or any members thereof, or by the Lieutenant-Governor individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland), to be abolished or altered by the respective Legislatures of Ontario and Quebec (see sec. 12).

66. The Provisions of this Act referring to the Lieutenant-Governor in Council shall be construed as referring to the Lieutenant-Governor of the Province acting by and with the advice of the Executive Council thereof.

67. The Governor-General in Council may from Time to Time appoint an Administrator to execute the Office and Functions of Lieutenant-Governor during his Absence, Illness, or other Inability.

68. Unless and until the Executive Government of any Province otherwise directs with respect to that Province, the Seats of Government of the Provinces shall be as follows, namely,—of Ontario, the City of Toronto; of Quebec, the City of Quebec; of Nova Scotia, the City of Halifax; and of New Brunswick, the City of Fredericton.

Legislative Power.

1.—ONTARIO.

69. There shall be a Legislature for Ontario, consisting of the Lieutenant-Governor and of One House, styled the Legislative Assembly of Ontario.

70. The Legislative Assembly of Ontario shall be composed of Eighty-two Members, to be elected to represent the Eighty-two Electoral Districts set forth in the First Schedule to this Act.

2.—QUEBEC.

71. There shall be a Legislature for Quebec, consisting of the Lieutenant-Governor and of Two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

72. The Legislative Council of Quebec shall be composed of Twenty-four Members, to be appointed by the Lieutenant-Governor in the Queen's Name by Instrument under the Great Seal of Quebec, one being appointed to represent each of the Twenty-four Electoral Divisions of Lower Canada in this Act referred to, and each holding Office for the Term of his life, unless the Legislature of Quebec otherwise provides under the Provisions of this Act.

(See R. S. C. 1909, ss. 84-86).

73. The Qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec.

74. The Place of a Legislative Councillor of Quebec shall become vacant in the Cases, *mutatis mutandis*, in which the Place of Senator becomes vacant.

75. When a Vacancy happens in the Legislative Council of Quebec by Resignation, Death or otherwise, the Lieutenant-Governor, in the Queen's Name, by Instrument under the Great Seal of Quebec, shall appoint a fit and qualified Person to fill the Vacancy.

76. If any Question arises respecting the Qualification of a Legislative Councillor of Quebec, or a vacancy in the Legislative Council of Quebec, the same shall be heard and determined by the Legislative Council.

77. The Lieutenant-Governor may, from Time to Time, by Instrument under the Great Seal of Quebec, appoint a Member of the Legislative Council of Quebec to be Speaker thereof, and may remove him and appoint another in his Stead.

78. Until the Legislature of Quebec otherwise provides, the Presence of at least Ten Members of the Legislative Council, including the Speaker, shall be necessary to constitute a Meeting for the Exercise of its Powers.

79. Questions arising in the Legislative Council of Quebec shall be decided by a Majority of Voices, and the Speaker shall in all cases have a Vote, and when the Voices are equal, the Decision shall be deemed to be in the negative.

80. The Legislative Assembly of Quebec shall be composed of Sixty-five Members, to be elected to represent the Sixty-five Electoral Divisions or Districts of Lower Canada in this Act referred to, subject to Alteration thereof by the Legislature of Quebec: Provided that it shall not be lawful to present to the

Lieutenant-Governor of Quebec for Assent any Bill for altering the Limits of any of the Electoral Divisions or Districts mentioned in the Second Schedule to this Act, unless the Second and Third Readings of such Bill have been passed in the Legislative Assembly with the Concurrence of the Majority of the Members representing all those Electoral Divisions or Districts, and the Assent shall not be given to such Bill unless an Address has been presented by the Legislative Assembly to the Lieutenant-Governor, stating that it has been so passed.

3.—ONTARIO AND QUEBEC.

81. The Legislatures of Ontario and Quebec respectively shall be called together not later than Six Months after the Union.

82. The Lieutenant-Governor of Ontario and of Quebec shall, from time to time, in the Queen's Name, by Instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province.

83. Until the Legislature of Ontario or of Quebec otherwise provides, a Person accepting or holding in Ontario or in Quebec, any Office, Commission or Employment, permanent or temporary, at the nomination of the Lieutenant-Governor, to which an annual Salary, or any Fee, Allowance, Emolument or profit of any kind or Amount whatever from the Province is attached, shall not be eligible as a Member of the Legislative Assembly of the respective Province, nor shall he sit or vote as such; but nothing in this Section shall make ineligible any Person being a member of the Executive Council of the respective Province, or holding any of the following offices, that is to say, the offices of Attorney-General, Secretary and Registrar of the Province, Treasurer of the Province, Commissioner of Crown Lands, and Commissioner of Agriculture and Public Works, and in Quebec, Solicitor-General, or shall disqualify him to sit or vote in the House for which he is elected, provided he is elected while holding such office.

84. Until the Legislatures of Ontario and Quebec respectively otherwise provide, all Laws which at the Union are in force in those Provinces respectively, relative to the following matters or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the Assembly of Canada, the Qualifications or Disquali-

fications of Voters, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which such Elections may be continued, and the trial of Controverted Elections and the Proceedings incident thereto, the vacating of the Seats of Members, and the issuing and execution of new Writs in case of Seats vacated otherwise than by Dissolution, shall respectively apply to Elections of Members to serve in the respective Legislative Assemblies of Ontario and Quebec.

Provided that until the Legislature of Ontario otherwise provides, at any Election for a member of the Legislative Assembly of Ontario for the District of Algoma, in addition to persons qualified by the Law of the Province of Canada to vote, every male British Subject aged Twenty-one Years or upwards, being a Householder, shall have a Vote.

85. Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for Four Years from the Day of the Return of the Writs for choosing the same (subject, nevertheless, to either the Legislative Assembly of Ontario or the Legislative Assembly of Quebec being sooner dissolved by the Lieutenant-Governor of the Province), and no longer.

86. There shall be a Session of the Legislature of Ontario and of that of Quebec, once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Legislature in each Province in one Session and its first Sitting in the next Session.

87. The following Provisions of this Act respecting the House of Commons of Canada, shall extend and apply to the Legislative Assemblies of Ontario and Quebec, that is to say,—the Provisions relating to the Election of a Speaker originally and on Vacancies, the Duties of the Speaker, the Absence of the Speaker, the Quorum, and the Mode of Voting, as if those Provisions were here re-enacted and made applicable in terms to each such Legislative Assembly.

4.—NOVA SCOTIA AND NEW BRUNSWICK.

88. The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act; and the House of

Assembly of New Brunswick existing at the passing of this Act shall, unless sooner dissolved, continue for the period for which it was elected.

(The second chamber of Nova Scotia (the Legislative Council) is composed of not more than 21 nominated members. The members cannot be members of the Federal Parliament or hold certain specified offices under the Provincial Government. It appears that prior to 1867 the Governor could not increase the number of the Legislative Council beyond twenty-one (see Commission to Earl Cathcart), and the Governor was directed to suspend members upon bankruptcy, insolvency, conviction for an infamous crime, or absence for a prescribed period (see despatch to Lord Falkland, Aug. 20th, 1845). Membership of the Council was during pleasure. Though the Governor was thus limited, the Crown was not. After Nova Scotia entered into the Union, the Crown was no longer able to increase the number, but the tenure continued to be during pleasure. Many attempts to abolish this Council have been in vain, as members appointed thereto on condition of voting for abolition have not kept their pledges, and the Imperial Government has steadfastly refused to aid abolition by swamping the House by legislation, being of opinion that alteration of the constitution was entirely a matter for the province (see B. N. A. Act, s. 91). It would appear that legally, but unconstitutionally, the Lieutenant-Governor could dismiss all Councillors and appoint others to consent to abolition.

The Legislative Assembly of Nova Scotia consists of thirty-eight members and exists for five years, unless it is sooner dissolved.

The Legislative Council of New Brunswick came to an end in 1892, by virtue of an Act passed in 1891).

(Note that in Prince Edward Island the second chamber was merged in the Assembly by an Act of 1893, whilst that in Manitoba was abolished in 1876. Ontario, British Columbia, Alberta, and Saskatchewan have never had a second chamber).

5.—ONTARIO, QUEBEC AND NOVA SCOTIA.

89. Each of the Lieutenant-Governors of Ontario, Quebec, and Nova Scotia, shall cause Writs to be issued for the first Election of Members of the Legislative Assembly thereof in such Form and by such Person as he thinks fit, and at such

Time and addressed to such Returning Officer as the Governor-General directs, and so that the first Election of Member of Assembly for any Electoral District or any Subdivision thereof shall be held at the same Time and at the same Places as the Election for a Member to serve in the House of Commons of Canada for that Electoral District.

6.—THE FOUR PROVINCES.

90. The following Provisions of this Act respecting the Parliament of Canada, namely,—the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, and Assent to Bills, the Disallowance of Acts and the Signification of Pleasure on Bills reserved,—shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Queen, and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

(Notwithstanding the omission of words "in Council" after the words "Governor-General," the best opinion is that disallowance of provincial bills, &c., should be made upon ministerial advice, and that the omission is unintentional and has not the effect of casting personal responsibility upon the Governor-General. In fact, the power always has been exercised in Council. It should be noticed that an Order-in-Council in England is not quite the same thing as it is in Canada, as in England an order may be issued at a meeting of the Council at which no minister is present, and at the request of a single departmental minister: whereas in Canada, Council practically means the ministers, and necessarily introduces the idea of ministerial responsibility. The reading of the words " in Council " into the section lessens, however, the security of the provinces.

As a rule, Lieutenant-Governors assent to all bills, though they may know they will be disallowed.

Where provincial Acts seem open to objection because they are altogether or partly illegal or unconstitutional, or clash with Dominion legislation or affect the interest of the Dominion generally, the Minister of Justice makes detailed reports of them. It has been laid down in *Severn* v. *The Queen*, 2 S. C. R.

70, that the assertion of the prerogative right of disallowance by the Federal Government would always be considered a harsh exercise of power, unless in cases of great and manifest necessity, or where the Act was so clearly beyond the powers of the local legislature that the propriety of interfering would at once be recognized. Sir Allan Aylesworth is of opinion that it was not intended by the British North America Act that the power of disallowance should be exercised for the purpose of annulling provincial legislation, even though the Dominion Ministry considered the legislation unjust or oppressive, or in conflict with recognized legal principles, so long as such legislation was within the power of the provincial legislature to enact it. (Provincial Legislation, 1904-6, p. 8).

Refusal of assent or reservation seems not to be legitimate save on explicit instructions, even in a case where a bill contains mistakes. In that case, it seems to be the better course that the bill should be repealed by another passed the same session.

Mr. Blake (see Canada Sess. Papers 1877, No. 13), laid it down that Dominion legislation should be completed within Canada, and pressed for withdrawal from the instructions to the Governor-General of directions to reserve specific classes of bills. This was done, but reservation was not abandoned entirely. The ordinary course now taken is to declare that a law is not to come into effect until the Governor-General issues a proclamation, if issued. (See fifteenth part of the Merchant Shipping Act, R. S. C. 1906, c. 113).

VI.—DISTRIBUTION OF LEGISLATIVE POWERS.

Powers of the Parliament.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and Good Government of Canada in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated, that is to say:—

1. The Public Debt and Property.
(See sections 102-126).

2. The Regulation of Trade and Commerce.

(Regulation of trade and commerce includes political arrangements in regard to trade requiring sanction of parliament, regulations of trade in matters of inter-provincial concern, and it may be that the words would include general regulations of trade affecting the whole Dominion, but not the regulation by legislation of the contract of a particular business or trade, such as the business of fire insurance in a particular province).

(The Power of the Dominion to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies, the objects of which extend to the entire Dominion, should be exercisable and what limitations should be placed on such powers. (*John Deere Plow Co.* v. *Wharton*, [1915] A. C. 330).

3. The Raising of Money by any Mode or System of Taxation.

The taxation may be either direct or indirect. See s. 92 (2).

4. The Borrowing of Money on the Public Credit.

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9. Beacons, Buoys, Lighthouses and Sable Island.

10. Navigation and Shipping.

(The Supreme Court of Canada has upheld the validity of the Dominion Merchant Shipping Act, but, query, whether it is not repugnant to 36 & 37 Vict. c. 85, s. 17. See *China Merchants' Steam Navigation Co.* v. *Bignold*, 7 A. C. 512, *The Khedive*, 5 A. C. 486, and *The Ship 'Cuba'* v. *McMillan*, 26 S. C. R. 651).

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

13. Ferries between a Province and any British or Foreign Country, or between Two Provinces.

14. Currency and Coinage.

15. Banking, Incorporation of Banks and the Issue of Paper Money.

(Banking is an expression which is large enough to embrace every transaction coming within the legitimate business of a banker. (*Tennant* v. *Union Bank*, [1894] A. C. 46).)

16. Savings Banks.

17. Weights and Measures.

18. Bills of Exchange and Promissory Notes.

19. Interest.

(It may be that the Dominion power as to 'interest' will be ultimately found to be confined to fixing what shall be the legal rate of interest apart from express agreement or express provincial enactment, and the passing of usury laws, restricting the charging of interest throughout the Dominion or any part thereof. Lefroy, p. 278).

20. Legal Tender.

21. Bankruptcy and Insolvency.

22. Patents of Invention and Discovery.

23. Copyrights.

24. Indians and Lands reserved for the Indians.
(See note to s. 109).

25. Naturalization and Aliens.

("The Dominion Parliament has power to decide the conditions on which naturalization shall be accorded, but the rights of a naturalized person in any province must depend on the provincial law, *e.g.* an alien may be prohibited from voting, but the province must not go so far as to prohibit the continued residence of aliens in the province by preventing them earning their living in the province. See *Union Colliery Co. of British Columbia* v. *Bryden* (1899), A. C. 580, and 1 B. C. (Irving) 101. (Keith, p. 698).

It is very doubtful whether in view of this decision (*In re Nakane and Okazaka*, 13 B. C. R. 370) much useful purpose will ever be served by a province attempting to legislate regarding the question of immigration. Normally legislation restricting immigration has been simply disallowed, as being contrary to Dominion policy, and in any case possibly invalid (Keith, p. 689).

"The net result, therefore, of these two Privy Council decisions (*Union Colliery Co.* v. *Bryden,* [1899] A. C. 580, and *Cunningham* v. *Tomey Homma,* 1903, A. C. 151), seems to be that provincial legislatures cannot legislate against aliens, whether before or after naturalization, merely as such aliens, so as to deprive them of the ordinary rights of the inhabitants of the province; although they might so legislate against them as possessing this or that personal characteristic or habit, which disqualifies them from being permitted to engage in certain occupations, or enjoy certain rights generally enjoyed by other people in the province. The Dominion Parliament alone can legislate in relation to them merely as aliens. But it is a different matter when rights and privileges which have to be specially conferred are in question, such as the right to exercise the franchise. It is within the power of provincial legislatures to refuse to confer such rights upon aliens or any other class of persons in the province; and especially is this clear in the case of the legislative franchise for the qualifications for the exercise of that are an integral part of the Constitution of the province, which by No. 1 of section 92 is expressly assigned exclusively to the provincial legislature." (Lefroy p. 308).]

26. Marriage and Divorce.

["Their Lordships have arrived at the conclusion that the jurisdiction of the Dominion Parliament does not, on the true construction of sections 91 and 92, cover the whole field of validity. They consider that the provision in section 92 conferring on the provincial legislature the exclusive power to make laws relating to the solemnization of marriage in the province operates by way of exception to the powers conferred as regards marriage by section 91, and enables the provincial legislature to enact conditions as to solemnization which may affect the validity of the contract. There have doubtless been periods as there have been and are countries where the validity of the marriage depends on the bare contract of the parties without reference to any solemnity. But there are, at least, as many instances when the contrary doctrine has prevailed. The Common law of England, and the law of Quebec, before Confederation, are conspicuous examples, which would naturally have been in the minds of those who inserted the words about solemnization of marriage into the statute. *Prima facie* these words appear to their Lordships to import that the whole of what solem-

nization ordinarily meant in the systems of law of the provinces of Canada at the time of Confederation is intended to come within them, including conditions which affect validity." (*Marriage Reference,* [1912] A. C. 880).]

27. The Criminal Law, except the Constitution of the Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

(See Note to 92 (15)).

28. The Establishment, Maintenance and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:—

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor.

[Apparently a provincial legislature may impose upon the Lieutenant-Governor a statutory increase of duties germane to the office (*A.-G. of Canada* v. *A.-G. of Ontario,* 20 O. R. 222, but see *Re Initiative and Referendum Act* [1917] 1 W. W. R. 1012, where Cameron, J. A., expresses an opinion that it is immaterial whether a provincial legislature by an Act seeks to add to or take from the rights, powers or authorities, which by virtue of his office, a Lieutenant-Governor exercises; in either case it is *ultra vires* legislation).

In the case last cited it was held that the Initiative and Referendum Act of Manitoba was *ultra vires,* in part. The case lays down the rule that a provincial parliament cannot abdicate its functions, and that it may delegate powers in the nature

of policing regulations, powers necessary for the proper carrying into effect of legislation, but not powers which would have the effect of causing others to take the place of or perform the functions of the legislature.

The Act in question provided for a bill carried by a referendum becoming law even against the will of the legislature. Other Provincial Acts providing for a referendum stipulate that the legislature shall pass the bill when it has received the endorsement of the people. The validity of such an Act seems questionable. There would appear to be latent in it an abdication of the most essential function of a legislature, deliberation and debate. The Alberta Act is of this nature, but its validity is as yet intact.]

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

[The Provincial Legislature may, whenever it sees fit, impose direct taxation for a local purpose upon a particular locality within the Province (see *Dow* v. *Black* L. R. 6 P. C. 272).

It is *ultra vires* of a Provincial Legislature to tax property not within the Province (*Woodruff* v. *A.-G. for Ontario* [1908] A. C. 508, and *Cotton* v. *R.* [1914] A. C. 176.

A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. (Dictum of John Stuart Mill quoted with approval by the Privy Council, per Lord Moulton, in *Cotton* v. *R.*, [1914], A.C. 176; 83 L.J.P.C. 105).

It has been held in Manitoba that heading 14 of this section will not authorize indirect taxation for the purposes of that heading. *Dulmage* v. *Douglas,* 4 Man. L. R. 495). *Sed quære.*

3. The Borrowing of Money on the sole Credit of the Province.

4. The Establishment and Tenure of Provincial Offices, and the Appointment and Payment of Provincial Officers.

5. The Management and Sale of the Public Lands belonging to the Province, and of the Timber and Wood thereon.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

[The authority given by s. 92 (8) to make laws as to municipal institutions in the province only authorizes the giving of such institutions powers that are given to the provincial legislature by the other headings of the sections, and does not permit the clothing of the municipal institution with all the wide authority which might have been granted to them before federation.]

9. Shop, Saloon, Tavern, Auctioneer, and other Licenses, in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

[Apparently there is nothing to hinder provincial legislatures from demanding licenses as a method of police regulation. Taxation by license is direct taxation. See the Brewers and Maltsters' Association Case [1897], A. C. 231.

In construing this section 'other licenses' is not to be construed *ejusdem generis*. The Privy Council in the case just cited did not doubt that general words might be restricted to things of the same kind as those particularized, but were unable to see what was the genus which would include 'shop, saloon, tavern and auctioneers' licenses and which would exclude brewers' and distillers' licenses.'

In *John Deere Plow Co. Ltd.* v. *Wharton* [1915], A. C. 330, it was held that the provisions of the Companies' Act of British Columbia compelling a Dominion company to obtain a license to carry on business or to be registered as a condition of exercising its powers or of suing in the courts are inoperative for such purposes, inasmuch as they are directed to interfering with the status and corporate capacity of Dominion companies, and to preventing them from exercising the powers conferred on them by the Parliament of Canada, dealing with a matter which was not entrusted under section 92 of the B.N.A. Act to Provincial Legislatures.]

10. Local Works and Undertakings, other than such as are of the following Classes,—

a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings, connecting

the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

[The net result of s. 92 (10 a) when read in conjunction with s. 91 (29) is to confer upon the Dominion Parliament exclusive right of legislation with regard to railways, canals, telegraphs and other works and undertakings connecting a province with any other province or provinces, or extending beyond the limits of the province. On the other hand the province clearly has powers to legislate exclusively regarding property and private rights. The line of distinction may be seen by considering the following propositions:—

(1). Provincial legislation as to the physical tracks and works of a Dominion railway is impossible (*A.-G. (Alberta)* v. *A.-G. (Canada)*, [1915] A. C. 363), so is legislation directing the creation of new works or the alteration of the construction of the Dominion railway (*Madden* v. *Nelson* [1899], A. C. 626. Thus a province could not regulate the structure of a ditch forming part of the Dominion railway's authorized works, but could provide that in the event of its becoming choked with silt or rubbish so as to cause overflow and injury to adjoining property, it should be thoroughly cleaned out (*C.P.R.* v. *Notre Dame de Bonsecours* [1899], A.C. 367).

(2). Federal legisation as to rates to be charged by provincial railway companies is *ultra vires* (The Through Traffic Case [1912], A. C. 333) (Keith, page 709).

Lefroy (p. 452) thinks that provincial Acts authorizing the construction of a railway to the boundary line of a province are *intra vires* of the province, and so also with regard to Acts authorizing the construction of canals, telegraphs, telephones, or electric power transmission lines to the boundary of the province.]

b. Lines of Steamships between the Province and any British or Foreign Country:

c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

[The powers of provincial legislatures to incorporate companies with provincial objects and to make laws in relation to Property and Civil Rights in the province must be read *disjunctim* and the latter expression must be regarded as excluding cases expressly dealt with elsewhere in sections 91 & 92, notwithstanding the generality of the words. (*John Deere Plow Co.* v. *Wharton* [1915], A. C. 330).]

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of subjects enumerated in this Section.

[It is not a breach of the criminal law for a province to punish by imprisonment for default on a judgment debt (*Ex p. Ellis*, 1 P. & B. 593), and a Provincial Legislature may punish by hard labour (*Hodge* v. *The Queen*, 9 A.C. 117). If an offence is a crime in criminal law the province has no authority to make provision for its trial and punishment (*R.* v. *Lawrence*, 43 U. C. Q. B. 164), but in the sphere of its authority it can regulate procedure (*Pope* v. *Griffith*, 16 L. Jur. 169, *R.* v. *Bittle*, 21 O. R. 605).]

16. Generally all matters of a merely local or private nature in the Province.

[The Dominion has pre-legislated on the subject of the Lord's Day Observance; provincial legislation on the subject seems to be *ultra vires* (*A.-G. for Ontario* v. *Hamilton Street Railway*, [1903] A.C. 524, and Reference to Supreme Court, 55 S.C.R. 581).

"The Privy Council in the case of the prohibitory liquor law [1896], A.C. 348, even allowed a province to forbid manufacture if its prohibition could be regarded in any one case as a merely provincial matter; while they did not think importation could

be forbidden, because that would go beyond private or local matters solely. But they did not accept as a ground the view that prohibition of manufacture or importation would interfere with Dominion powers." (Keith, p. 719).]

Education.

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—

(1). Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by law in the Province at the Union;

(2). All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects, shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec;

(3). Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor-General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education;

(4). In case any such Provincial Law as from Time to Time seems to the Governor-General in Council requisite for the due Execution of the Provisions of this Section is not made, or in any case any Decision of the Governor-General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section, and of any Decision of the Governor-General in Council under this Section.

Uniformity of Laws in Ontario, Nova Scotia and New Brunswick.

94. Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that behalf, the Power of the Parliament of Canada to make Laws in relation to any matter comprised in any such Act, shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity, shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

Agriculture and Immigration.

95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province, relative to Agriculture or to Immigration, shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

(This is the only case of true 'concurrent' legislation of Dominion and Province).

VII.—JUDICATURE.

96. The Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor-General shall be selected from the respective Bars of those Provinces.

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

99. The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on Address of the Senate and House of Commons.

100. The Salaries, Allowances and Pensions of the Judges of the Superior, District and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in cases where the Judges thereof are for the time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

[The Supreme Court of Canada exercises an appellate jurisdiction in case of appeals from provincial Courts, the jurisdiction varying with regard to the different Provinces. Appeals lie from this Court to the Privy Council by special leave (there being also a direct appeal to the Privy Council from the provincial Supreme Courts). The Court also has an appellate jurisdiction in the case of controverted elections, but from its decision no appeal lies to the Privy Council (see *Theberge* v. *Landry*, 2 A.C. 102). To this Court the Governor-General refers important questions of law or fact as to interpretation of the B. N. A. Act or the constitutionality of any Dominion or Provincial Act. These judgments are merely advisory, but are to be treated as final judgments for the purpose of appeal to the Privy Council. The Supreme Courts will not hear appeals from the reference of constitutional questions by the Provincial governments to the Provincial Courts, though such appeals are provided for by the Provincial Statutes.

The judges of the Supreme Court of the Superior Courts of the provinces hold office during good behaviour, but are removable by the Governor-General on address of the Senate and House of Commons. The salaries are not voted annually, they are put on the civil list. It should be noted that Burke's Act, 22 Geo. III., c. 75, applicable to all officers appointed by patent and holding during good behaviour, permits the Governor in Council of a colony to amove a judge, but not without the approval of the Privy Council. To judges of Superior Courts this Act has no application, though it may have to judges of the Supreme

Court and of the various Provincial, District and County Courts. These last are by statute removable for sufficient cause (R.S.C. 1906, c. 138, s. 2). (Keith, 1338).

A colonial judicial officer is exempt from suit on the same principles as apply to an Imperial judge (see *Haggard* v. *Pelicier Freres* [1892], A.C. 61; *Anderson* v. *Gorrie* [1895], I. Q. B. 668).]

VIII.—REVENUES; DEBTS; ASSETS; TAXATION.

102. All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia and New Brunswick before and at the Union, had and have power of Appropriation, except such Portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the manner and subject to the charges in this Act provided.

103. The Consolidated Revenue Fund of Canada shall be permanently charged with the Costs, Charges and Expenses incident to the Collection, Management, and Receipt thereof, and the same shall form the First Charge thereon, subject to be reviewed and audited in such Manner as shall be ordered by the Governor-General in Council until the Parliament otherwise provides.

104. The annual Interest of the Public Debts of the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union shall form the Second Charge on the Consolidated Revenue Fund of Canada.

105. Unless altered by the Parliament of Canada, the Salary of the Governor-General shall be Ten Thousand Pounds Sterling Money of the United Kingdom of Great Britain and Ireland, payable out of the Consolidated Revenue Fund of Canada, and the same shall form the Third Charge thereon.

106. Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public Service.

107. All Stocks, Cash, Bankers' Balances, and Securities for Money belonging to each Province at the Time of the Union,

except as in this Act mentioned, shall be the Property of Canada, and shall be taken in Reduction of the amount of the Respective Debts of the Provinces at the Union.

108. The Public Works and Property of each Province enumerated in the Third Schedule to this Act shall be the Property of Canada.

109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any interest other than that of the Province in the same.

[It must be always kept in view that where public land, with its incidents, is described as 'the property of' or as 'belonging to' the Dominion or a province, these expressions merely import that the right to its beneficial user, or to its proceeds, has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its Legislature, the land itself being vested in the Crown (*St. Catherine's Milling and Lumber Co.* v. *The Queen,* 58 L.J.P.C. 54).

Lands in Ontario surrendered by the Indians by treaty become vested in the Crown for the beneficial use of the province, whose grantees' title prevails over the title purported to be granted by the Dominion. (*Ontario Mining Co.* v. *Seybold,* 72 L.J.P.C. 5).

It should be noticed that in British Columbia "the Indian" title has been denied and almost completely disregarded. (Clement, p. 634).

It seems to be the better opinion that a province cannot of its own motion and power extinguish Indian Rights.

It has been contended that what is meant by 'royalties' in the phrase 'all lands, mines, minerals and royalties' is royalties in connection with mines or minerals, but this restriction of the meaning of the word did not commend itself to the Privy Council in *Attorney-General of Ontario* v. *Mercer,* 8 A. C. 767. "It appears," runs the judgment in that case, "however, to their Lordships to be a fallacy to assume that because the word 'royalties' in this context would not be inofficious or insensible,

if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to these subjects. They see no reason why it should not have its primary and appropriate sense, as to (at all events) all the subjects with which it is here found associated—lands, as well as mines and minerals." Even as to mines and minerals, it here necessarily signifies rights belonging "to the Crown, *jure coronae*." The judgment carefully adds: "Their Lordships are not now called upon to decide whether the word 'royalties' in section 109 of the British North America Act of 1867, extends to other royal rights besides those connected with 'lands,' 'mines' and 'minerals.'"

Escheats arising in Alberta and Saskatchewan are amongst the rights and sources of revenue excepted and reserved to the Dominion of Canada by the Acts, s. 21, creating them as provinces. (*Rex* v. *Trusts and Guarantee Co.* [1917], I.W.W.R. 358). As to the position in Manitoba see sec. 30 of the Manitoba Act.

The word "royalties" includes prerogative rights to gold and silver mines (The Precious Metals Case, 14 A. C. 295), which accordingly are vested in the Crown, subject to the control and disposal of the Government of British Columbia.

"The expressions 'subject to any trusts existing in respect thereof' and 'subject to any interest other than that of the province' appear to their Lordships to be intended to refer to different classes of right. Their Lordships are not prepared to hold that the word trust was meant by the legislature to be strictly limited to such proper trusts as a Court of Equity would undertake to administer; but, in their opinion, must at least have been intended to signify the existence of a contractual or legal duty, incumbent upon the holder of the beneficial estate, or its proceeds, to make payment, out of the one or other of those, of the debt due to the creditor to whom that duty ought to be fulfilled. On the other hand 'an interest, other than of the province in the same,' appears to them to denote some right or interest in a third party, independent of and capable of being vindicated in competition with the beneficial interest of the old province. Their Lordships have been unable to discover any reasonable grounds for holding that by the terms of the treaties any independent interest of that kind was conferred upon the Indian communities. . .Their Lordships have had no difficulty in

coming to the conclusion that under the treaties the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement which was nothing more than a personal obligation by its Governor, as representing the old province, that the latter should pay the annuities as and when they became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered other than that of the province; and that no duty was imposed upon the province, whether in the nature of a trust, obligation, or otherwise, to apply the revenue derived from the surrendered lands in payment of the annuities (The Indian Claims Case [1897], A. C. 199, with reference to lands surrendered by Indians in Ontario for perpetual annuities and for augmented annuities in case the Government could in the future augment them without loss).]

110. All Assets connected with such Portions of the Public Debt of each Province as are assumed by that Province shall belong to that Province.

111. Canada shall be liable for the Debts and Liabilities of each Province existing at the Union.

112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the Debt of the Province of Canada exceeds at the Union Sixty-two million five hundred thousand Dollars, and shall be charged with interest at the Rate of Five per centum per annum thereon.

113. The Assets enumerated in the Fourth Schedule to this Act, belonging at the Union to the Province of Canada, shall be the Property of Ontario and Quebec conjointly.

114. Nova Scotia shall be liable to Canada for the Amount (if any) by which its Public Debt exceeds at the Union Eight million Dollars, and shall be charged with Interest at the rate of Five per centum per annum thereon.

115. New Brunswick shall be liable to Canada for the Amount (if any) by which its Public Debt exceeds at the Union Seven million Dollars, and shall be charged with Interest at the rate of Five per centum per annum thereon.

116. In case the Public Debts of Nova Scotia and New Brunswick do not at the Union amount to Eight million and Seven million Dollars respectively, they shall respectively receive, by half-yearly Payments in advance from the Government of Canada, Interest at Five per centum per annum on the dif-

ference between the actual Amounts of their respective Debts and such stipulated Amounts.

117. The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the country.

118. The following sums shall be paid yearly by Canada to the several Provinces for the support of their Governments and Legislatures:

	DOLLARS.
Ontario	Eighty thousand.
Quebec	Seventy thousand.
Nova Scotia	Sixty thousand
New Brunswick	Fifty thousand.
	Two hundred and Sixty thousand;

and an annual Grant in aid of each Province shall be made, equal to Eighty cents per Head of the Population as ascertained by the Census of One thousand eight hundred and sixty-one, and in the case of Nova Scotia and New Brunswick, by each subsequent Decennial Census until the Population of each of those two Provinces amounts to Four hundred thousand Souls, at which Rate such Grant shall thereafter remain. Such Grant shall be in full Settlement of all future demands on Canada, and shall be paid half-yearly in advance to each Province; but the Government of Canada shall deduct from such Grants, as against any Province, all sums chargeable as Interest on the Public Debt of that Province in excess of the several amounts stipulated in this Act.

119. New Brunswick shall receive, by half-yearly Payments in advance from Canada, for the Period of Ten Years from the Union, an additional Allowance of Sixty-three thousand Dollars per annum; but as long as the Public Debt of that Province remains under Seven million Dollars, a deduction equal to the Interest at five per centum per annum on such Deficiency shall be made from that Allowance of Sixty-three thousand Dollars.

120. All payments to be made under this Act, or in discharge of Liabilities created under any Act of the Provinces of Canada, Nova Scotia and New Brunswick, respectively, and assumed by Canada, shall until the Parliament of Canada otherwise directs,

be made in such Form and Manner as may from Time to Time be ordered by the Governor-General in Council.

121. All Articles of the Growth, Produce or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

122. The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of Canada.

123. Where Custom Duties are, at the Union, leviable on any Goods, Wares or Merchandises in any Two Provinces, those Goods, Wares and Merchandises may, from and after the Union, be imported from one of those Provinces into the other of them, on Proof of Payment of the Customs Duty leviable thereon in the Province of Exportation and on payment of such further amount (if any) of Customs duty as is leviable thereon in the Province of Importation.

124. Nothing in this Act shall affect the right of New Brunswick to levy the Lumber Dues provided in Chapter Fifteen of Title Three of the Revised Statutes of New Brunswick, or in any Act amending that Act before or after the Union, and not increasing the Amount of such Dues; but the Lumber of any of the Provinces other than New Brunswick shall not be subject to such Dues.

125. No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

126. Such Portions of the Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia and New Brunswick had before the Union, Power of Appropriation, as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all Duties and Revenues raised by them in accordance with the Special Powers conferred upon them by this Act, shall in each Province form One Consolidated Revenue Fund to be appropriated for the Public Service of the Province.

IV.—MISCELLANEOUS PROVISIONS.

General.

127. If any Person, being at the passing of this Act, a Member of the Legislative Council of Canada, Nova Scotia or New Brunswick, to whom a Place in the Senate is offered, does not

within Thirty Days thereafter, by Writing under his Hand, addressed to the Governor-General of the Province of Canada or to the Lieutenant-Governor of Nova Scotia or New Brunswick (as the case may be), accept the same, he shall be deemed to have declined the same; and any Person who, being at the passing of this Act a Member of the Legislative Council of Nova Scotia or New Brunswick, accepts a Place in the Senate, shall thereby vacate his seat in such Legislative Council. (See sec. 24).

128. Every Member of the Senate or House of Commons of Canada shall, before taking his Seat therein, take and subscribe before the Governor-General or some Person Authorized by him, and every Member of a Legislative Council or Legislative Assembly of any Province shall, before taking his Seat therein, take and subscribe before the Lieutenant-Governor of the Province, or some Person authorized by him, the Oath of Allegiance contained in the Fifth Schedule to this Act; and every Member of the Senate of Canada and every Member of the Legislative Council of Quebec shall also, before taking his Seat therein, take and subscribe before the Governor-General, or some Person authorized by him, the Declaration of Qualification contained in the same Schedule.

129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all Legal Commissions, Powers and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue, in Ontario, Quebec, Nova Scotia, and New Brunswick, respectively, as if the Union had not been made; subject nevertheless, (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

130. Until the Parliament of Canada otherwise provides, all Officers of the several Provinces having Duties to discharge in relation to Matters other than those coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces, shall be Officers of Canada, and shall continue to discharge the Duties of their respective Offices under the same

Liabilities, Responsibilities and Penalties, as if the Union had not been made.

131. Until the Parliament of Canada otherwise provides, the Governor-General-in-Council may from Time to Time appoint such Officers as the Governor-General-in-Council deems necessary or proper for the effectual Execution of this Act.

132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

Ontario and Quebec.

134. Until the Legislature of Ontario or of Quebec otherwise provides, the Lieutenant-Governors of Ontario and Quebec may each appoint under the Great Seal of the Province, the following Officers, to hold office during Pleasure, that is to say,—the Attorney-General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands and the Commissioner of Agriculture and Public Works, and, in the case of Quebec, the Solicitor-General, and may, by Order of the Lieutenant-Governor-in-Council from Time to Time prescribe the Duties of those Officers and of the several Departments over which they shall preside, or to which they shall belong, and of the Officers and Clerks thereof, and may also appoint other and additional Officers to hold Office during Pleasure, and may from Time to Time prescribe the duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof.

135. Until the Legislature of Ontario or Quebec otherwise provides, all Rights, Powers, Duties, Functions, Responsibilities, or Authorities at the passing of this Act vested in or imposed on the Attorney-General, Solicitor-General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works and Minister of Agriculture and Receiver-General, by any Law, Statute or Ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any officer to be appointed by the Lieutenant-Governor for the Discharge of the same or any of them; and the Commissioner of Agriculture and Public Works shall perform the Duties and Functions of the Office of Minister of Agriculture at the passing of this Act imposed by the Law of the Province of Canada, as well as those of the Commissioner of Public Works.

136. Until altered by the Lieutenant-Governor-in-Council, the Great Seals of Ontario and Quebec, respectively, shall be the same or of the same Design, as those used in the Provinces of Upper Canada and Lower Canada respectively before their Union as the Province of Canada.

137. The words "and from thence to the End of the then next ensuing Session of the Legislature," or words to the same effect used in any temporary Act of the Province of Canada not expired before the Union, shall be construed to extend and apply to the next Session of the Parliament of Canada, if the subject-matter of the Act is within the powers of the same as defined by this Act, or to the next Sessions of the Legislatures of Ontario and Quebec respectively, if the subject-matter of the Act is within the powers of the same as defined by this Act.

138. From and after the Union, the use of the words "Upper Canada" instead of "Ontario," or "Lower Canada" instead of "Quebec," in any Deed, Writ, Process, Pleading, Document, Matter or Thing, shall not invalidate the same.

139. Any Proclamation under the Great Seal of the Province of Canada, issued before the Union, to take effect at a time which is subsequent to the Union, whether relating to that Province or to Upper Canada, or to Lower Canada, and the several matters and things therein proclaimed, shall be and continue of like force and effect as if the Union had not been made.

140. Any Proclamation which is authorized by any Act of the Legislature of the Province of Canada, to be issued under the Great Seal of the Province of Canada, whether relating to that Province or to Upper Canada, or to Lower Canada, and which is not issued before the Union, may be issued by the Lieutenant-Governor of Ontario or of Quebec, as its subject-matter requires, under the Great Seal thereof; and from and after the issue of such Proclamation, the same and the several matters and things therein proclaimed, shall be and continue of the like force and effect in Ontario or Quebec as if the Union had not been made.

141. The Penitentiary of the Province of Canada shall, until the Parliament of Canada otherwise provides, be and continue the Penitentiary of Ontario and of Quebec.

142. The Division and Adjustment of the Debts, Credits, Liabilities, Properties and Assets of Upper Canada and Lower Canada shall be referred to the Arbitrament of Three Arbitrators, One chosen by the Government of Ontario, One by the Government of Quebec, and One by the Government of Canada; and the Selection of the Arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the Arbitrator chosen by the Government of Canada shall not be a resident either in Ontario or in Quebec.

143. The Governor-General-in-Council may from Time to Time, order that such and so many of the Records, Books, and Documents of the Province of Canada as he thinks fit shall be appropriated and delivered either to Ontario or to Quebec, and the same shall thenceforth be the property of that Province; and any copy thereof or extract therefrom, duly certified by the officer having charge of the original thereof, shall be admitted as Evidence.

144. The Lieutenant-Governor of Quebec may from Time to Time, by Proclamation under the Great Seal of the Province, to take effect from a day to be appointed therein, constitute Townships in those Parts of the Province of Quebec in which Townships are not then already constituted, and fix the Metes and Bounds thereof.

X.—INTERCOLONIAL RAILWAY.

145. Inasmuch as the Provinces of Canada, Nova Scotia, and New Brunswick have joined in a Declaration that the Construc-

tion of the Intercolonial Railway is essential to the Consolidation of the Union of British North America, and to the Assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that Provision should be made for its immediate construction by the Government of Canada: Therefore, in order to give effect to that Agreement, it shall be the Duty of the Government and Parliament of Canada to provide for the Commencement, within Six months after the Union, of a Railway connecting the River St. Lawrence with the City of Halifax in Nova Scotia, and for the Construction thereof without Intermission, and the Completion thereof with all practicable Speed.

XI.—ADMISSION OF OTHER COLONIES.

146. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada, to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order-in-Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

(See 34 & 35 Vict. c. 28, s. 2, *infra*).

[Upon the admission of Rupert's Land no conditions were expressed in the address, and apart from this it was very doubtful whether the Dominion Government could legislate for the rest of the territory of the Hudson's Bay Co. To remedy this the Act of 1871 (*infra*) was passed. In the Act of 1870 provision was made for the government of that part of Rupert's Land and North-West Territories not included in Manitoba, by means of a Lieutenant-Governor and a nominated council. In 1875 a part of the Legislative Council was allowed to be elected, and in 1888 a Legislative Assembly was substituted for the Council, the judges being advisory members but not entitled to vote; there was also an advisory finance council holding office during pleasure. In 1891 (c. 22) further powers were given to

the Legislature, and in 1897 (c. 28) a responsible executive was granted, and by legislation in 1898 (c. 5) and 1900 (c. 44), the powers were extended so as to amount to almost provincial powers; there was a Lieutenant-Governor nominally holding office during pleasure, but, practically, for five years, a council nominated from the Assembly, and an elective assembly of 31 members sitting for four years. In 1905 Saskatchewan and Alberta were created and given practically complete provincial rights, but not the control of Crown lands. In the Act also were inserted provisions designed to secure to Catholics, or others, their denominational or separate schools.

The rest of the North-Western Territories are now governed under R. S. C. 1906, c. 62, by a Commissioner, assisted by a small council with powers of legislation practically equivalent to the old powers, if conceded by the Governor-General in Council. The laws of Canada apply to the North-Western Territories, unless otherwise specified.

The Yukon Territory was separated from the N. W. T. in 1895. There is, since 1909, an elective council of ten members sitting for three years, and a Commissioner. The powers of legislation are similar to the old powers of the North-Western Territories, the Governor-General in Council having power to make temporary Ordinances.]

147. In case of the Admission of Newfoundland and Prince Edward Island or either of them, each shall be entitled to a Representation, in the Senate of Canada, of Four Members, and (notwithstanding anything in this Act) in case of the Admission of Newfoundland, the Normal Number of Senators shall be Seventy-six and their Maximum Number shall be Eighty-two; but Prince Edward Island, when admitted, shall be deemed to be comprised in the third of the three Divisions into which Canada is, in relation to the Constitution of the Senate, divided by this Act, and accordingly, after the admission of Prince Edward Island, whether Newfoundland is admitted or not, the Representation of Nova Scotia and New Brunswick in the Senate shall, as Vacancies occur, be reduced from Twelve to Ten Members respectively, and the Representation of each of those Provinces shall not be increased at any Time beyond Ten, except under the Provisions of this Act, for the Appointment of Three or Six additional Senators under the Direction of the Queen.

SCHEDULES.

THE FIRST SCHEDULE.

Electoral Districts of Ontario.

A.

EXISTING ELECTORAL DIVISIONS.

COUNTIES.

1. Prescott.
2. Glengarry.
3. Stormont.
4. Dundas.
5. Russell.
6. Carleton.
7. Prince Edward.
8. Halton.
9. Essex.

RIDINGS OF COUNTIES.

10. North Riding of Lanark.
11. South Riding of Lanark.
12. North Riding of Leeds and North Riding of Grenville.
13. South Riding of Leeds.
14. South Riding of Grenville.
15. East Riding of Northumberland.
16. West Riding of Northumberland (excepting therefrom the Township of South Monaghan).
17. East Riding of Durham.
18. West Riding of Durham.
19. North Riding of Ontario.
20. South Riding of Ontario.

21. East Riding of York.

22. West Riding of York.

23. North Riding of York.

24. North Riding of Wentworth.

25. South Riding of Wentworth.

26. East Riding of Elgin.

27. West Riding of Elgin.

28. North Riding of Waterloo.

29. South Riding of Waterloo.

30. North Riding of Brant.

31. South Riding of Brant.

32. North Riding of Oxford.

33. South Riding of Oxford.

34. East Riding of Middlesex.

CITIES, PARTS OF CITIES AND TOWNS.

35. West Toronto.

36. East Toronto.

37. Hamilton.

38. Ottawa.

39. Kingston.

40. London.

41. Town of Brockville, with the Township of Elizabethtown thereto attached.

42. Town of Niagara, with the Township of Niagara thereto attached.

43. Town of Cornwall, with the Township of Cornwall thereto attached.

B.

NEW ELECTORAL DIVISIONS.

44. The Provisional Judicial District of Algoma.

The County of BRUCE, divided into Two Ridings, to be called respectively the North and South Ridings:—

45. The North Riding of Bruce to consist of the Townships of Bury, Lindsay, Eastnor, Albemarle, Amabel, Arran, Bruce, Elderslie, and Saugeen, and the Village of Southampton.

46. The South Riding of Bruce to consist of the Townships of Kincardine (including the Village of Kincardine), Greenock, Brant, Huron, Kinloss, Culross, and Carrick.

The County of HURON, divided into Two Ridings, to be called respectively the North and South Ridings:-

47. The North Riding to consist of the Townships of Ashfield, Wawanosh, Turnberry, Howick, Morris, Grey, Colborne, Hullett (including the Village of Clinton), and McKillop.

48. The South Riding to consist of the Town of Goderich, and the townships of Goderich, Tuckersmith, Stanley, Hay, Usborne, and Stephen.

The County of MIDDLESEX, divided into Three Ridings, to be called respectively the North, West and East Ridings:—

49. The North Riding to consist of the Townships of McGillivray and Biddulph (taken from the County of Huron), and Williams East, Williams West, Adelaide and Lobo.

50. The West Riding to consist of the Townships of Delaware, Caradoc, Metcalfe, Mosa and Ekfrid, and the Village of Strathroy.

[The East Riding to consist of the Townships now embraced therein, and be bounded as it is at present.]

51. The County of LAMBTON to consist of the Townships of Bosanquet, Warwick, Plympton, Sarnia, Moore, Enniskillen and Brooke, and the Town of Sarnia.

52. The County of KENT to consist of the Townships of Chatham, Dover, East Tilbury, Romney, Raleigh and Harwich, and the Town of Chatham.

53. The County of BOTHWELL to consist of the Townships of Sombra, Dawn and Euphemia (taken from the County of Lambton), and the Townships of Zone, Camden with the Gore thereof, Orford and Howard (taken from the County of Kent).

The County of GREY, divided into Two Ridings, to be called respectively the South and North Ridings:—

54. The South Riding to consist of the Townships of Bentinck, Glenelg, Artemesia, Osprey, Normanby, Egremont, Proton and Melanethon.

55. The North Riding to consist of the Townships of Collingwood, Euphrasia, Holland, St. Vincent, Sydenham, Sullivan, Derby and Keppel, Sarawak and Brooke, and the Town of Owen Sound.

The County of PERTH, divided into Two Ridings, to be called respectively the South and North Ridings:—

56. The North Riding to consist of the Townships of Wallace, Elma, Logan, Ellice, Mornington, and North Easthope, and the Town of Stratford.

57. The South Riding to consist of the Townships of Blanchard, Downie, South Easthope, Fullarton, Hibbert, and the villages of Mitchell and St. Marys.

The County of WELLINGTON, divided into Three Ridings, to be called respectively North, South and Centre Ridings:—

58. The North Riding to consist of the Townships of Amaranth, Arthur, Luther, Minto, Maryborough, Peel, and the Village of Mount Forest.

59. The Centre Riding to consist of the Townships of Garafraxa, Erin, Eramosa, Nichol and Pilkington, and the Villages of Fergus and Elora.

60. The South Riding to consist of the Town of Guelph and the Townships of Guelph and Puslinch.

The County of NORFOLK, divided into Two Ridings, to be called respectively the South and North Ridings:—

61. The South Riding to consist of the Townships of Charlotteville, Houghton, Walsingham and Woodhouse, and with the Gore thereof.

62. The North Riding to consist of the Townships of Middleton, Townsend and Windham, and the Town of Simcoe.

63. The County of HALDIMAND to consist of the Townships of Oneida, Seneca, Cayuga North, Cayuga South, Rainham, Walpole and Dunn.

64. The County of MONCK to consist of the Townships of Canborough and Moulton, and Sherbrooke, and the Village of Dunnville (taken from the County of Haldimand), the Townships of Caister and Gainsborough (taken from the County of Lincoln), and the Townships of Pelham and Wainfleet (taken from the County of Welland).

65. The County of LINCOLN to consist of the Townships of Clinton, Grantham, Grimsby and Louth, and the Town of St. Catharines.

66. The County of WELLAND to consist of the Townships of Bertie, Crowland, Humberstone, Stamford, Thorold and Willoughby, and the Villages of Chippewa, Clifton, Fort Erie, Thorold and Welland.

67. The County of PEEL to consist of the Townships of Chinguacousy, Toronto, and the Gore of Toronto, and the Villages of Brampton and Streetsville.

68. The County of CARDWELL to consist of the Townships of Albion and Caledon (taken from the County of Peel), and the Townships of Adjala and Mona (taken from the County of Simcoe).

The County of SIMCOE, divided into Two Ridings, to be called respectively the South and the North Ridings:—

69. The South Riding to consist of the Townships of West Gwillimbury, Tecumseth, Innisfil, Essa, Tossorontio, Mulmur, and the Village of Bradford.

70. The North Riding to consist of the Townships of Nottawasaga, Sunnidale, Vespra, Flos, Oro, Medonte, Orillia and Matchedash, Tiny and Tay, Balaklava and Robinson, and the Towns of Barrie and Collingwood.

The County of VICTORIA, divided into Two Ridings, to be called respectively the South and North Ridings:—

71. The South Riding to consist of the Townships of Ops, Mariposa, Emily, Verulam, and the Town of Lindsay.

72. The North Riding to consist of the Townships of Anson, Bexley, Carden, Dalton, Digby, Eldon, Fenelon, Hinden, Laxton, Lutterworth, Macaulay, and Draper, Sommerville and Morrison, Muskoka, Monck and Watt (taken from the County of Simcoe), and any other surveyed Townships lying to the North of the said North Riding.

The County of PETERBOROUGH, divided into Two Ridings, to be called respectively the West and East Ridings:—

73. The West Riding to consist of the Townships of South Monaghan (taken from the County of Northumberland), North Monaghan, Smith and Ennismore, and the Town of Peterborough.

74. The East Riding to consist of the Townships of Asphodel, Belmont and Methuen, Douro, Dummer, Galway, Harvey, Minden, Stanhope and Dysart, Otonabee and Snowden, and the Village of Ashburnham, and any other surveyed Townships lying to the North of the said East Riding.

The county of HASTINGS, divided into Three Ridings, to be called respectively the West, East and North Ridings:—

75. The West Riding to consist of the Town of Belleville, the Township of Sydney, and the Village of Trenton.

76. The East Riding to consist of the Townships of Thurlow, Tyendinaga and Hungerford.

77. The North Riding to consist of the Townships of Rawdon, Huntingdon, Madoc, Elzevir, Tudor, Marmora and Lake, and the Village of Stirling, and any other surveyed Townships lying to the North of the said North Riding.

78. The County of LENNOX to consist of the Townships of Richmond, Adolphustown, North Fredericksburgh, South Fredericksburgh, Ernest Town and Amherst Island, and the Village of Napanee.

79. The County of ADDINGTON to consist of the Townships of Camden, Portland, Sheffield, Hinchinbrooke, Kaladar, Kennebec, Olden, Oso, Anglesea, Barrie, Clarendon, Palmerston, Effingham, Abinger, Miller, Canonto, Denbigh, Loughborough and Bedford.

80. The County of FRONTENAC to consist of the Townships of Kingston, Wolfe Island, Pittsburgh and Howe Island and Storrington.

The County of RENFREW, divided into Two Ridings, to be called respectively the South and North Ridings:—

81. The South Riding to consist of the Townships of McNab, Bagot, Blithfield, Brougham, Horton, Admaston, Grattan, Matawatchan, Griffith, Lyndoch, Raglan, Radcliffe, Brudenell, Sebastopol, and the Villages of Arnprior and Renfrew.

82. The North Riding to consist of the Townships of Ross, Bromley, Westmeath, Stafford, Pembroke, Wilberforce, Alice, Petawawa, Buchanan, South Algona, North Algona, Fraser, McKay, Wylie, Rolph, Head, Maria, Clara, Haggerty, Sherwood, Burns, and Richards, and any other surveyed Townships lying North-westerly of the said North Riding.

Every Town and incorporated Village existing at the Union, not specially mentioned in this Schedule, is to be taken as part of the County or Riding within which it is locally situate.

THE SECOND SCHEDULE.

Electoral Districts of Quebec specially fixed.

COUNTIES OF

Pontiac.	Shefford.
Ottawa.	Stanstead.
Argenteuil.	Compton.
Huntingdon.	Wolfe and Richmond.
Missisquoi.	Megantic.
Brome.	Town of Sherbrooke.

THE THIRD SCHEDULE.

Provincial Public Works and Property to be the Property of Canada.

1. Canals with Lands and Water Power connected therewith.

2. Public Harbours.

["It must depend, to some extent, at all events upon the circumstances of each particular harbour, what forms a part of that harbour."....It does not follow that because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of that harbour. It may or may not do, according to circumstances. If, for example, it had actually been used for harbour purposes, it would no doubt form part of the harbour; but there are other cases in which, in their lordships' opinion, it would be equally clear that it did not form part of it." *The Fisheries Case,* [1898] A. C. 700.]

3. Lighthouses and Piers, and Sable Island.

4. Steamboats, Dredges, and Public Vessels.

5. Rivers and Lake Improvements.

[This means river 'improvements and lake improvements.' *The Fisheries Case, supra.*]

6. Railways and Railway Stocks, Mortgages and other Debts due by Railway Companies.

7. Military Roads.

8. Custom Houses, Post Offices, and all other Public Buildings, except such as the Government of Canada appropriate for the use of the Provincial Legislatures and Governments.

9. Property transferred by the Imperial Government, and known as Ordnance Property.

10. Armouries, Drill Sheds, Military Clothing and Munitions of War, and Lands set apart for General Public Purposes.

THE FOURTH SCHEDULE.

Assets to be the Property of Ontario and Quebec conjointly.

Upper Canada Building Fund.
Lunatic Asylums.
Normal Schools.
Court Houses in:
Aylmer.
Montreal.
Kamouraska.
} Lower Canada.
Law Society, Upper Canada.
Montreal Turnpike Trust.
University Permanent Fund.
Royal Institution.
Consolidated Municipal Loan Fund, Upper Canada.
Consolidated Municipal Loan Fund, Lower Canada.
Agricultural Society, Upper Canada.
Lower Canada Legislative Grant.
Quebec Fire Loan.
Temiscouata Advance Account.
Quebec Turnpike Trust.
Education—East.
Building and Jury Fund, Lower Canada.
Municipalities Fund.
Lower Canada Superior Education Income Fund.

THE FIFTH SCHEDULE.

OATH OF ALLEGIANCE.

I, *A. B.*, do swear that I will be faithful and bear true Allegiance to Her Majesty Queen Victoria.

NOTE.—*The Name of the King or Queen of the United Kingdom of Great Britain and Ireland for the Time being is to be substituted from Time to Time, with proper Terms of Reference thereto.*

DECLARATION OF QUALIFICATION.

I, *A. B.*, do declare and testify, That I am by Law duly qualified to be appointed a Member of the Senate of Canada [*or as the case may be*], and that I am legally or equitably seized as of Freehold for my own Use and Benefit of Lands or Tenements held in Free and Common Socage [*or* seized or possessed for my own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture (*as the case may be*), in the Province of Nova Scotia [*or as the case may be*], of the Value of Four Thousand Dollars over and above all Rents, Dues, Debts, Mortgages, Charges, and Incumbrances, due and payable out of or charged on or affecting the same, and that I have not collusively or colourably obtained a title to or become possessed of the said Lands and Tenements or any Part thereof for the Purpose of enabling me to become a Member of the Senate of Canada [*or as the case may be*], and that my Real and Personal Property are together worth Four Thousand Dollars over and above my Debts and Liabilities.

B.

34-35 *VICTORIA.*

CHAP. XXVIII.

An Act respecting the establishment of Provinces in the Dominion of Canada.

[29*th June*, 1871.]

WHEREAS doubts have been entertained respecting the powers of the Parliament of Canada to establish Provinces in Territories admitted, or which may hereafter be admitted into the

Dominion of Canada, and to provide for the representation of such Provinces in the said Parliament, and it is expedient to remove such doubts, and to vest such powers in the said Parliament:—

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as "The British North America Act, 1871."

2. The Parliament of Canada may from Time to Time establish new Provinces in any Territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of Laws for the peace, order and good government of such Province, and for its representation in the said Parliament. (See Man. Act, s. 146).

3. The Parliament of Canada may from Time to Time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of Territory in relation to any Province affected thereby.

4. The Parliament of Canada may from Time to Time make provision for the administration, peace, order, and good government of any Territory not for the time being included in any Province.

5. The following Acts passed by the said Parliament of Canada, and intituled respectively: "An Act for the temporary government of Rupert's Land and the North Western Territory when united with Canada," and "An Act to amend and continue the Act thirty-two and thirty-three Victoria, chapter three, and to establish and provide for the government of the Province of Manitoba," shall be and be deemed to have

been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor-General of the said Dominion of Canada.

6. Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last mentioned Act of the said Parliament, in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from Time to Time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly, and to make laws respecting elections in the said Province.

C.

38-39 *VICTORIA.*

CHAP. XXXVIII.

An Act to remove doubts with respect to the powers of the Parliament of Canada under Section Eighteen of the British North America Act, 1867.

[19*th July,* 1875.

WHEREAS by Section Eighteen of the British North America Act, 1867, it is provided as follows:—

"The privileges, immunities and powers to be held, enjoyed and exercised by the Senate and by the House of Commons, and by the Members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the members thereof."

And whereas doubts have arisen with regard to the power of defining by an Act of the Parliament of Canada, in pursuance of the said section, the said privileges, powers, or immunities: and it is expedient to remove such doubts:

Be it, therefore, enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Section eighteen of the British North America Act, 1867, is hereby repealed without prejudice to anything done under that section, and the following section shall be substituted for the section so repealed.

The privileges, immunities and powers to be held, enjoyed and exercised by the Senate and by the House of Commons, and by the Members thereof, respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities and powers shall not confer any privileges, immunities or powers exceeding those at the passing of such Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof.

2. The Act of the Parliament of Canada passed in the thirty-first year of the Reign of Her present Majesty, chapter twenty-four, intituled "An Act to provide for oaths to witnesses being administered in certain cases for the purposes of either House of Parliament," shall be deemed to be valid, and to have been valid as from the date at which the Royal assent was given thereto by the Governor-General of the Dominion of Canada.

3. This Act may be cited as "The Parliament of Canada Act, 1875."

D.

49-50 *VICTORIA.*

CHAP. XXXV.

An Act respecting the Representation in the Parliament of Canada of Territories which for the time being form part of the Dominion of Canada, but are not included in any Province.

[*25th June,* 1886.]

WHEREAS it is expedient to empower the Parliament of Canada to provide for the representation in the Senate and House

of Commons of Canada or either of them, of any Territory which for the time being forms part of the Dominion of Canada, but is not included in any province.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. The Parliament of Canada may, from time to time, make provisions for the representation in the Senate and House of Commons of Canada, or in either of them, of any Territories which for the time being form part of the Dominion of Canada, but are not included in any province thereof.

2. Any Act passed by the Parliament of Canada before the passing of this Act for the purpose mentioned in this Act shall, if not disallowed by the Queen, be, and shall be deemed to have been, valid and effectual from the date at which it received the assent, in Her Majesty's name, of the Governor-General of Canada.

It is hereby declared that any Act passed by the Parliament of Canada, whether before or after the passing of this Act, for the purpose mentioned in this Act or in the British North America Act, 1871, has effect, notwithstanding anything in the British North America Act, 1867, and the number of Senators or the number of members of the House of Commons specified in the last mentioned Act is increased by the number of Senators or of members, as the case may be, provided by any such Act of the Parliament of Canada for the representation of any provinces or territories of Canada.

3. This Act may be cited as the British North America Act, 1886.

This Act and the British North America Act, 1867, and the British North America Act, 1871, shall be construed together and may be cited together as the British North America Acts, 1867 to 1886.

CHAPTER XIX.

Trial by Jury.

There can be but little doubt that the origin of our modern civil jury is to be found in the system of recognition which was introduced from Normandy at the time of William I. This system of recognition by sworn inquest consisted in questions of fact relating to fiscal or judicial business being submitted by the officers of the Crown to sworn witnesses in the local Courts. A notable instance of its employment is the Doomsday inquest. To prepare the Doomsday Book the King sent out barons who made a survey of property on the oath of the sheriff, and all the barons and Norman landowners of the shire, and of the priest, reeve and six villagers from every township. Gradually this inquest by recognition, originally used to ascertain facts in the interests of the Crown or the Exchequer, was gradually allowed as between subjects. The reason for this extension was probably the desire of the King that litigants should adopt this royal process, rather than compurgation, ordeal or trial by battle. It was better for the King that he should become the fountain of justice, and indeed it was also probably better for the litigant, who was by no means sure of justice in the Lord's Courts or in the communal Courts.

This inquisition is first used in the Assize of novel disseisin which protected the possession of freeholders. A writ is directed to the sheriff ordering the summoning of a body of neighbors who shall declare on their oath whether the defendant unjustly and without judgment disseised the plaintiff. This was followed by the Grand Assize which was applicable to cases where the title to the freehold as distinct from the right to possession, was involved. In the case of the possessory Assizes the twelve recognitors were chosen directly by the sheriff; whilst in the case of the Grand Assize four knights were elected by the parties and they in turn elected the twelve recognitors. "If they all knew the facts and were agreed as to their verdict, well and good; if some or all were ignorant, the fact was certified in court and new knights were named, until twelve were

found to be agreed. The same course was followed when the twelve were. New knights were added until the twelve were agreed. This was called afforcing the assize. At this time the knowledge on which the jurors acted was their own personal knowledge, acquired independently of the trial. "So entirely," says Forsyth, "did they proceed upon their own previously formed view of the facts in dispute that they seem to have considered themselves at liberty to pay no attention to evidence offered in court, however clearly it might disprove the case which they were prepared to support." The use of recognition is prescribed by the constitutions of Clarendon (1166) for cases of dispute as to lay or clerical tenure.

This procedure by the assize was confined to real actions (in general, those actions having to do with real property or freeholds) and while it preceded it is not identical with the modern jury trial in civil cases, which was gradually introduced by consent of the parties and on pressure from the judges. Jury trial differs from the grand and petty assizes in that the assizes were summoned at the same time as the defendant to answer a question formulated in the writ; whereas in the ordinary jury trial no order for a jury could be made till the parties by their pleadings had come to an issue of fact and had put themselves on the country, *posuerunt se super patriam* (Pollock and Maitland, i., 119-128, ii., 601, 615, 621; E. B. v. 15, 588). An *assisa* decides a question formulated in the original writ, a *jurata* decides a question which has arisen out of the pleadings.

In the reign of Henry II. by the Assizes of Clarendon (1166) and Northampton (1176) the presentment of crimes by twelve men representing each hundred was made a regular permanent procedure. It is not clear whether this jury is a lineal successor of the twelve senior thegns who under an ordinance of Aethelred II. were sworn in the county court that they would accuse no innocent man and acquit no guilty one. It seems to be the better opinion that there is no direct connection between the two. Maitland considers this new grand jury to be another offshoot of the royal and fiscal inquisition: "To ascertain and protect the rights of the Crown is the main object, and it seems almost a by-end that incidentally crime may thus be discovered and suppressed." The itinerant judges are sup-

plied with lists of inquiries which they are to lay before juries representing the various hundreds which they visit. These lists of inquiries are known as articles of the eyre, *capitula itineris*, and in the main they are fiscal inquiries; the royal revenue is the chief end in view. The jurors are to swear as to what profits have fallen to the Crown, as to escheats, forfeitures, marriages, wardships, widows, Jews, treasure trove and other sources of income; also as to the misdoings of the sheriff and his bailiffs; also as to murders, robberies and so forth, for crime also brings money to the royal exchequer—for instance there are murder fines to be collected. It is not improbable that our Norman Kings occasionally directed inquisitions of this sort. In Henry II.'s reign, under the Assizes of Clarendon and Northampton, the presentation of crimes by twelve men representing each hundred was made a regular permanent procedure. The twelve sworn hundredors are to present crimes; the persons whom they accuse are to go to the ordeal; if they fail at the ordeal, they are to be punished by mutilation. What is more, the Assize of Northampton betrays some mistrust of the efficacy of the ordeal as a means of eliciting the truth, for even if a person thus accused satisfies the test, and thus has the judgment of God in his favour, he is to abjure the realm, that is, he is to leave the realm swearing never to return. It was directed by the Assize of Clarendon that the justices in eyre and the sheriffs (in the county courts) should inquire by twelve lawful men of the hundred, and by four lawful men from each of the four vills nearest to the scene of the alleged crime, as to whether in the hundred or vill there was any man accused as a robber or murderer, or thief, or receiver of such. (To these crimes the Assize of Northampton added forgery of coin or charters and arson). "Henceforward," says Maitland, "English law has two criminal procedures; there is the appeal—a private accusation brought by the person primarily wronged by the crime, the person, e.g., whose goods have been stolen, or the nearest kinsman of the murdered man; then there is the indictment—the sworn accusation of twelve men who have sworn to present the crimes committed within their hundred."

About the reign of Henry II. it became possible for a person who had been appealed of some crime to avoid the trial by battle by purchasing from the King the right of having the

question tried by an inquest of his neighbors. By Magna Charta an accused person received this right, without having to purchase it.

The ordeal itself fell into disuse owing to the decree of the fourth Lateran Council, 1219, which prohibited clergy from taking part in it. Thereafter, it became the law that an accused person must put himself upon his country, or else stay in gaol. He certainly could not be tried unless he put himself upon his country, but he could be pressed or starved to death unless he did so (*peine forte et dure*) in that he 'stood mute of malice.' Less than two hundred years ago, an accused person was actually pressed into pleading.

Originally, the jury were chosen because they had actual knowledge of the facts of the case, but about the reign of Henry IV. it became the practice to hear evidence in open court, and about the reign of Queen Mary the jury were not summoned on account of any special knowledge of the facts that they might possess.

In the reign of Edward III. it was held that the verdict of a jury must be unanimous, and so it came to be thought that a want of unanimity amounted to perversity, hence the old rule that a jury should not be allowed either fire or food whilst considering the verdict.

Juries also might be fined or imprisoned for giving a wrong verdict, which might have been proper enough when they were actual witnesses, but was scarcely sustainable when they ceased to be so. In such cases, the jury was put upon its trial by a jury of attaint and were heavily punished if found guilty. The object of an attaint was sufficiently secured by a motion for a new trial and it was, after long disuse, abolished in the reign of George IV. The entire immunity of juries from punishment for giving a false verdict was settled in 1670 by Bushell's Case. Bushell was foreman of the jury which acquitted Wm. Penn and Wm. Mead, the Quakers, on a charge of street preaching in contravention of the Conventicle Act. The Recorder fined the jury 40 marks each, and Bushell on refusing to pay was committed to prison. He sued out a habeas corpus, to which a return was made that he had been committed for finding a verdict "against full and manifest

evidence and against the direction of the Court." This return was held to be insufficient by Chief Justice Vaughan and Bushell was discharged from custody.

Upon the question as to whether a jury in criminal trials may return a "general verdict," i.e., whether they might return a verdict of guilty or not guilty, instead of determining merely the facts. This was settled in general by Bushell's Case, but Lord Mansfield reawakened the question as to cases of libel upon the trial of the printers of the "North Briton" in 1764, by ruling that it was the province of the Court alone to judge of the criminality of the libel. The question was finally set to rest in favour of the jury by Fox's Libel Act in 1792.

CHAPTER XX.

Taxation and Expenditure.

Taxation.

There can be but little doubt that prior to the Norman Conquest, the consent of the Witan to extraordinary taxation was necessary, but after the conquest there does not appear to have been any necessity for the consent of the National Council. The necessary consent seems to have been regarded as a consent on the part of the tax-payer rather than of any assembly.

Amongst the sources of national revenue there must be mentioned the right to tallage or tax the tenants on the demesne land of the King. Then again there were the ancient and right customs (*antiquae et rectae consuetudines*) payable by merchants. These customs duties fell on imported wine and exported wool, woolfells and leather. The toll on wine was called prisage, butlerage or tunnage, and amounted to one in every ten tuns. These were confirmed in Magna Charta, which forbade the imposition of unjust (presumably any other exactions), tolls, evil tolls or maletolts. The custom duties granted to Edward I. in 1275 were known as the *antiqua custuma,* or ancient customs. Additional customs taken by Edward I. by agreement with foreign merchants in 1302 were known as the *nova sive parva custuma* (new or small customs), and still further duties were granted to Richard II. for life under the name of tunnage and poundage. These taxes were generally granted by Parliament to the King for life, but from the accession of the House of Lancaster (1399) up to the reign of Mary (1553) the King never imposed any duty upon his own authority. In 1557 Mary placed customs duties on exported cloths and imported French wines. Queen Elizabeth added a duty on sweet wines and James I. imposed an additional duty on currants. This last, John Bates, a Levant merchant, refused to pay and an information was exhibited against him in the Court of Exchequer, with the result that the unanimous opinion of the four barons went in favour of the King. The decision seems to have been based on the grounds that customs were matters of commerce and that commerce was a matter for the King's absolute power (as distinguished from his ordi-

nary power) for the safety of his people. "The King may shut the ports altogether; therefore he may take toll at the ports." This victory encouraged the King to publish in 1608 a Book of Rates imposing heavy duties on almost all articles of commerce.

In 1640 the Long Parliament passed an Act which, whilst granting tunnage and poundage to the King for less than two months, "declared and exacted that it is, and hath been, the ancient right of the subjects of the realm that no subsidy, custom impost, or other charge whatsoever, ought or may be laid or imposed upon any merchandise exported or imported by subjects, denizens or aliens, without common consent in Parliament."

There never has been the same contest over excise duties as over custom duties, as the former were first imposed by parliamentary authority, viz., by an ordinance of the Long Parliament in 1643, when duties were imposed on beer, ale, cider, perry, wine and tobacco. Excise licenses were first invented in 1784.

Danegeld was a tax of two shillings on every hide of land (about 33 acres) which was originally imposed by Ethelred II. to raise the Danish tribute, and was paid down to the twentieth year of the reign of Henry II. It was revived in the reign of Richard I. under the thin disguise of a carucage or tax upon ploughland.

The Saladin tithe granted to Henry II. in 1188 to defray the expenses of the Crusade appears to have been the first attempt to tax personal or movable property. The assessment of the tax was effected by means of a jury of neighbors.

From the beginning of the 14th century it may be said that direct taxation, at any rate, could not be imposed without the common consent of the realm. The Confirmatio Chartarum of 1297 runs as follows: "Moreover we have granted for us and our heirs, as well to archbishops, bishops, abbots, priors and other folk of holy Church, as also to earls, barons and to all the commonalty of the land, that for no business from henceforth will we take such manner of aids, tasks, nor prises, but by the common consent of the realm, and for the common profit thereof, saving the ancient aids and prises due and accustomed."

Edward I. tallaged his demesne lands in 1304, but this may not have offended against the letter of the law, as the taxation may have been regarded as imposed rather by a landlord, than by a King.

Control over Expenditure.

Although it is true that as early as Magna Charta, the principle was established that consent of the National Assembly was a condition precedent to taxation, yet the control of the House of Commons over the expenditure of the money raised by taxation or over any of the royal revenue was ineffectual. "The Crown," says Sir William Anson, "had an hereditary revenue from various sources which satisfied many of the needs of government. If the King wanted more, he asked for and obtained a grant of a tenth or a fifteenth on real or personal property. No means existed of assigning portions of the grant to particular services, or indeed of providing that the King should not spend the entire subsidy on purposes quite different from those for which it was asked. So when their grant was made the virtue had gone out of the Commons, they could exercise no control over policy till money was wanted again" (Anson, vol. I., 30).

Prior to the time of Charles II. there had been sporadic attempts at exacting accounts from the King or, as in 1624, in the case of money voted for the relief of the Palatinate, appropriation of supplies, but the attempt is not continuous until the reign of Charles II. In that reign a clause was introduced into the bill granting money for the prosecution of the Dutch war, providing that the money was to be applied only to the purposes of the war, and the precedent was followed in other cases during that reign. Even here the appropriation only extends to the expenditure of what might be termed extraordinary revenue. After the Revolution the practice was uniformly followed and money raised by taxation was appropriated to a specific purpose. In the reign of William III., a definite annual sum was assigned to the King for his own use, as distinct from national expenditure, while at the same time the burden of providing for the latter was lifted from his shoulders. This sum of money was known as the King's "Civil List" and had to meet the personal expenses of the King, the support

of the Royal Household and also the payment of civil officers and pensions. The direct control of Parliament over the King's personal expenses was first gained on the accession of George III., who surrendered to the nation his life interest in his hereditary revenues (demesne lands, forfeitures, bona vacantia, treasure trove, wrecks, legal fees, fines, etc., and all escheat, etc.), and all surplus which might accrue from them and received a fixed civil list of £800,000 for the support of his household, and the honour and dignity of the Crown. The present civil list amounts to about £500,000, inasmuch as one of the most important effects of the establishment of the principle of appropriation of supplies is that it becomes necessary for Parliament to assemble every year, as with regard to a great portion of the national expenditure no money can be legally paid out until it is embodied in an Appropriation Act.

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